

THE IMPACT OF E-TECHNOLOGY ON LAW OF CIVIL PROCEDURE IN SOUTH
AFRICA

by

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DECLARATION

Student Number: 61348325

I Nombulelo Queen Mabeka do hereby confirm and declare that my thesis is my own.

I further declare that I have cited all the sources that I referred to in the thesis. I also confirm that the sources are incorporated into the footnotes and they are fully referenced in the bibliography.

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Summary

The law of civil procedure is an important branch of South African law as it resolves individual civil disputes through a regulated judicial system. Mandatory statutes and rules regulate the processes when bringing disputes to court. For example, the Superior Courts Act 10 of 2013, regulates the superior courts, while the provisions of the Magistrates' Courts Act 32 of 1944, as well as the Small Claims Court Act 61 of 1984, control the lower courts. Further, a series of court rules ensure efficient operation of different courts and support the overarching legislation. For example, the Constitutional Court Rules, Rules Regulating the Conduct of the Proceedings of the Supreme Court of Appeal, Uniform Rules of Court, Magistrates' Courts' Rules, and the Rules of Small Claims Court support the implementation of legislation. The researcher submits, however, that the current legislative provisions, and their enabling rules, are not fully complementing the Electronic Communication and Transactions Act 25 of 2002 and are thereby impeding the growth of e-technology law in South Africa. Put differently, they do not embrace the use of e-technology and digital devices. It appears that in future civil proceedings will occur electronically through digital and e-technology devices. Present legislation does not cater for this practical reality. This calls for South African courts to, for example, install satellite devices that will ease the use of e- technology in civil proceedings. The researcher avers that there have been attempts by the Constitutional Court and Supreme Court of Appeal to enable electronic communication through their websites, but this is insufficient to effectively implement the provisions of the Electronic Communications and Transactions Act 25 of 2002 especially insofar as service of process. The courts have effectively moved away from the decision in *Narlis v SA Bank of Athens*, which excluded computer-generated evidence and there have been attempts by South African courts in recent decisions to appreciate the use of e-technology. For example, in *CMC Woodworking Machinery v Odendaal Kitchens* the court, for the first time, acknowledged service of court papers via Facebook. Further, in *Spring Forest Trading v Wilbery*, the Supreme Court of Appeal confirmed that electronic communication such e-mail, can be used to cancel agreements, even where parties incorporated a non-variation clause into the agreement. However, there is an urgent need to review and amend South African statutes and rules to fully acknowledge the fact that e-technology is a constantly evolving modern reality.

Therefore, South African laws and rules ought to be in-line with e-technology developments and competitive with international jurisdictions such as England, the United States of America and Canada. The rules of these jurisdictions realise the use of e-technology and digital e-technology, particularly in England where a pilot project that facilitates the use of e-technology and digital e-technology in civil proceedings, is already in place. The time has come to fully employ e-technology and digital e-technology law within South African law of civil procedure. This research investigates the possibility, and practical implications, thereof.

Key words

E-technology, civil procedure, courts rules, ECT, superior courts, lower courts, filing, serving, delivery of court documents.

Abbreviations

1. CC – Constitutional Court.
2. ECT Act/ ECTA – Electronic Communications and Transactions Act 25 of 2002.
3. CPA – Consumer Protection Act 68 of 2008.
4. HC – High Court.
5. ICT – Information and Communication Technologies.
6. IT – Information Technology.
7. LSSA Guidelines – Law Society of South Africa Guidelines on the use of Internet-Based E-technology in Legal Practice, 6 March 2015. Electronic Signatures for South African Firms – Guidelines: October 2014.
8. LSSA – Law Society of South Africa
9. MC – Magistrates' Court.
10. NCA – National Credit Act 34 of 2005.
11. PAJA – Promotion of Administrative Justice Act 3 of 2000.
12. PIPEDA – Personal Information Protection and Electronic Documents Act 2000.
13. POPI - Protection of Personal Information Act 4 of 2002.
14. RICA – Regulation of Interception of Communications and Provisions of Communication- Related Information Act 70 of 2002.
15. SCA – Supreme Court of Appeal.
16. SARS – South African Revenue Service.
17. UNCITRAL – United Nations Commission on International Trade Law of 1996.

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CHAPTER ONE – RESEARCH BACKGROUND AND METHODOLOGY

1. Introduction

Civil procedure is that branch of South African law that establishes mandatory guidelines and procedures followed in settling civil disputes.¹ Various legislative instruments and associated rules apply in court processes and proceedings.² In South Africa, these are, for example, the High Court and Magistrates' Courts Rules.³ These rules stem from various statutes applicable in civil procedure, namely, the Superior Courts Act 10 of 2013⁴ and Magistrates Courts Act 32 of 1944.⁵ It is submitted that although these rules of civil procedure are current in terms of acceptable practice, there are numerous ways in which the advancement of e-technology influences court proceedings and processes, which may not be specifically catered for in these instruments (both legislative and regulatory). Communication via e-mail and the use of social media, such as Facebook and Twitter, are classic examples of advancing e-technology not catered for in current legal provisions in South Africa.⁶

Court processes and proceedings still require physical issuing and service of court documents⁷ despite advances in technology generally, and e-technology in particular. These are but small examples of the impact of e-technology on the law of civil process. Contemporary trends show that in future the legislature must consider such advances, as they will influence the implementation of civil process. Subsequently, the law as it currently stands must meet the measure of both advances in e-technology, and the demands of a fast paced, connected world. The researcher will explore the meaning of electronic communication and describe different methods thereof currently used in civil processes as well as the relevant legislation applicable thereto.

¹ Faris JA and Hurter E *The Student Handbook for Civil Procedure* 7th ed. (LexisNexis Durban 2015) 3 – 335.

² Faris and Hurter *The Student Handbook for Civil Procedure* 3 - 335.

³ Faris and Hurter *The Student Handbook for Civil Procedure* 3 - 335.

⁴ Hereafter referred to as the Superior Court Act.

⁵ Hereinafter referred to as the Magistrates Courts Act.

⁶ Buys R *Cyberlaw @ SA - The Law of internet in South Africa* 2nd ed. (Van Schaick Publishers Pretoria 2004) 13.

⁷ Uniform Rules of the Court, Faris and Hurter *The Student Handbook for Civil Procedure* 13 – 63 and 135 – 335.

Subsequently, the researcher will comparatively analyse the prevailing legislative position against the expansion of e-technology and its potential influence on South African civil process.

2. Research background and historical contextualisation

Common law, as influenced by Roman law, Roman Dutch law and English Law, forms the genesis of South African civil procedure.⁸ Dainow describes civil law as the law originating from Roman law founded in the *jus civile*.⁹ Scott avers that civil procedure stems primarily from civil codes, which governed civil disputes between contesting parties.¹⁰ She further argues that codes guided individuals on the manner of settling their disputes within the judicial system.¹¹ McManamon likewise acknowledges that the history of civil procedure originates from civil codes. Pete *et al* indicate that the origin of law of civil procedure is civil law.¹² Much akin to the birth of criminal procedure from substantive criminal law, the law of civil procedure owes its origin to substantive civil law.

Millar indicates that the history of civil procedure stems from Roman law and goes back as far as the Middle Ages.¹³ Furthermore, he states that messengers of the court and sheriffs - still employed contemporarily - have existed in the magistrates' courts as far back as the Roman law period and have continued with the same objective of serving court documents. In his historical analysis, he gives a further example of discovery procedure and traces its origin to 1852. Likewise, he suggests that 1805 sees the implementation of the procedural concepts of issuing summons and petitioning.¹⁴

⁸ Humby T *et al Introduction to Law and Legal Skills* 1st ed. (Oxford University Press Cape Town) 108.

⁹ Dainow J 'The Civil Law and Common Law American' 1966- 1967 *Journal of Comparative Law* Vol. 15 No. 3 419 – 435.

¹⁰ Scott AW 'Trial by Jury and reform of civil procedure' 1918 *Harvard Law Review* Vol. 31 No. 5 669-691.

¹¹ Scott 1918 *Harvard Law Review* 669-691.

¹² Pete S *et al Civil Procedure- a practical guide – procedural law* 3rd ed. (Oxford University Press 2017) 52.

¹³ Millar WR 'Three American Ventures in Summary Civil Procedure 1928 *Yale Law Journal* Vol. 38 No. 2 193 – 224.

¹⁴ Millar 1928 *Yale Law Journal* 193 – 224.

While terminology used in civil process changes over time the overarching aim remains the settling of civil disputes in a formal and regulated manner. For example, the historical terminology used during debt collection relied on words such as *bonds* or *notes* instead of the modern liquid documents and un-liquidated claims.¹⁵ Further, historically in some instances, parties could begin litigation without necessarily filing pleadings.¹⁶ Nonetheless, civil law, and its resulting civil procedure, is part of the common law tradition, which aims to settle disputes.

Tetley states that common law forms part of legal tradition.¹⁷ He defines legal tradition as the law introduced in England around the 11th century.¹⁸ He further confirms that South African civil procedure stems from its forced integration of Roman Dutch Law.¹⁹ From a South African perspective, the history of legal tradition branches from Roman Dutch Law, which stems from Justinian's *Corpus Juris Civilis*.²⁰ Merryman supports Tetley's submission that civil procedure is a combination of various historical compositions originating from the *Corpus Juris Civilis*.²¹

Merryman avers that the law of civil procedure concerns different procedures followed in court processes to deal with disputes between individuals.²² Humby *et al* indicate that South African civil procedure falls within the umbrella of adjective law consisting of mandatory rules followed by affected parties, and the courts, together with its officials.²³

From a comparative perspective, Holtzoff indicates that civil procedure in the United States of America originated from federal rules of civil procedure.²⁴ Millar, in the same vein as Holtzoff, states that the terminology used in court proceedings was slightly different in that there were previously equity rules that regulated court processes and

¹⁵ Millar 1928 *Yale Law Journal* 193 – 224.

¹⁶ Millar 1928 *Yale Law Journal* 193 – 224.

¹⁷ Tetley W 'Mixed Jurisdiction; Common Law v Civil Law (codified and uncoded)' 2000 *La. L. Rev* 3.

¹⁸ Tetley 2000 *La. L. Rev.* 3-595.

¹⁹ Humby *et al* *Introduction to law and legal skills in South Africa* 242.

²⁰ Tetley 2000 *La. L. Rev* 3.

²¹ Merryman JH *The Civil Law Tradition: an introduction to the legal systems of Western Europe And Latin America* 3rd ed. (Stanford University Press California 2007) 6.

²² Merryman *The Civil Law Tradition* 123.

²³ Humby *et al* *Introduction to law and legal skills in South Africa* 242.

²⁴ Holtzoff A 'Origin and sources of the Federal Rules of Civil Procedure' 1955 *New York University Law Review* Vol. 30 1058 – 1080.

proceedings.²⁵ According to Holtzoff, marshals affected service in the states as opposed to messengers of the court and sheriffs.²⁶ Historically, summons proceedings were utilised in the states but there were only two pleadings, the complaint, and the answer.²⁷

In Canada, law of civil procedure was established by the 19th century.²⁸ In Canada, the clerk or the register of the court issues summons.²⁹ A statement of claim where the particulars of the facts in disputes are set out, follows summons.³⁰ These are served on the plaintiff in person.³¹ The defendant has an opportunity to defend the matter by submitting a statement of defence.³² Thereafter, the parties discover information relevant to the case.³³ Subsequently the matter is set-down for hearing. Contemporarily these processes are codified into law as discussed in chapter 4.

In the United Kingdom, law of civil procedure was recognized by the 12th century.³⁴ Various courts existed to implement civil process; for example, the king's court, the county courts, and so forth.³⁵ Bishops and priests, referred most disputes.³⁶ Proceedings commenced by issuing summons produced by justices of the peace.³⁷ The claimant served summons on the defendant.³⁸ Trial was by jury but this changed during the 18th century.³⁹ Statutes, such as the Constitution of the United Kingdom, Civil Procedure Act 1997, and various Practice Directions⁴⁰ now regulate law of civil procedure.⁴¹

²⁵ Holtzoff 1955 *New York University Law Review* Vol. 30 1058 – 1080.

²⁶ Holtzoff 1955 *New York University Law Review* Vol. 30 1058 – 1080.

²⁷ Holtzoff 1955 *New York University Law Review* Vol. 30 1058 – 1080.

²⁸ Watson GD, Borins S and Williams NJ *Canadian Civil Procedure* 2nd ed. (Butterworths Toronto 1977) 2- 6, Polten PE and Glezl P *Civil Procedure in Ontario* 2014 Polten & Associates 9 – 10 <http://www.poltenassociates.com> (Date of use: 22 December 2017).

²⁹ Watson, Borins and Williams *Canadian Civil Procedure* 3.

³⁰ Watson, Borins and Williams *Canadian Civil Procedure* 3.

³¹ *Orazio v Cuilla* Supreme Court of British Columbia (Chambers) 1966 57 W. W. R 641.

³² Watson, Borins and Williams *Canadian Civil Procedure* 4.

³³ Watson, Borins and Williams *Canadian Civil Procedure* 6.

³⁴ Bigelow MM *History of Procedure in England from the Norman Conquest: The Norman Period (1066 – 1204)* 1st ed. (Little Brown and Company Boston 1880)1-23.

³⁵ Bigelow *History of Procedure in England* 14-27.

³⁶ Bigelow *History of Procedure in England* 28.

³⁷ Bigelow *History of Procedure in England* 56.

³⁸ Bigelow *History of Procedure in England* 56.

³⁹ Robertson DW 'The Precedent Value of conclusions of Fact in Civil Procedure' 1968 *Louisiana Law Review* Vol 29 78 - 99.

⁴⁰ Practice Direction 5A – Courts Documents.

⁴¹ The Constitution of the United Kingdom.

3. Problem statement

The researcher's avenue of investigation centers around the impact of e-technology on civil process in South Africa. Legislation, and rules guiding civil procedure, form the platform that defines the research problem in this instance. The researcher introduces them briefly below.

3.1 Current law of civil procedure

In South Africa, the rules of courts enforce the Superior Courts Act and the Seventeenth Amendment Act 72 of 2012.⁴² Further, the Rules Board for Courts of Law Act 107 of 1985⁴³ regulates the establishment of the Board itself. The main function of the Board is to reconsider and/or review existing rules of court.

Various legislative instruments regulate court structure and process to ensure efficacy and fair process. The Superior Courts Act regulates the procedural conduct of the Constitutional Court, Supreme Court of Appeal, and High Court processes.⁴⁴ Although the point will be explored in detail in later chapters the researcher submits that the Superior Court Act does not give due regard to the advancement of e-technology. For example, section 43 of the Superior Courts Act, provides that a sheriff must execute court process manually.⁴⁵ Section 44 of the Act (also affected by advancement of e-technology) provides for the transmission of court process, for example, writs transmitted by fax or electronically as set out by the Rules.⁴⁶ While the researcher does not dispute the importance of these sections, she questions their validity in terms of contemporary global trends in civil procedure and e-technology augmentation.

It is important to highlight the different court structures in the South African system to find the fissures in the implementation of e-technology law in civil procedure.

⁴² Hereafter referred to as the Seventeenth Amendment Act.

⁴³ Hereinafter referred to as the Rules Board for Courts of Laws Act.

⁴⁴ Superior Courts Act.

⁴⁵ Section 43 of the Superior Courts Act.

⁴⁶ Section 44 of the Superior Courts Act.

3.1.1 Constitutional Court

The Constitution of the Republic of South Africa, 1996⁴⁷ established South African court structures. Enforcement of the constitutional provisions is entrenched in the Superior Courts Act, the Seventeenth Amendment Act, as well as the Magistrates' Courts Act respectively.

The Seventeenth Amendment Act and its Rules regulate Constitutional Court process and enforce the supremacy of the Constitution. The Seventeenth Amendment Act gives the Constitutional Court apex court status. This simply means that the Constitutional Court is the highest court of appeal.

The Constitutional Court Rules regulate proceedings in the Constitutional Court, and determine, for example, the number of judges constituting a quorum and the manner of service and filing of documents.

Advancement of e-technology potentially affects the constitutional Bill of Rights. For example, there is little doubt that the use of e-technology in civil proceedings infringes on the right to privacy for those party to proceedings. It is significant to consider the extent of this infringement as far as the future development of e-technology is concerned.⁴⁸ The researcher will therefore consider section 14 of the Constitution and jurisprudence to test and decide the extent of the potential infringement in this regard.

3.1.2 The Supreme Court of Appeal

The Rules of the Supreme Court of Appeal Court regulate process in the superior courts, such as the manner of requesting or filing court documents.⁴⁹ For example, Rule 6 requires parties to paginate the court file.⁵⁰

⁴⁷ Hereafter referred to as the Constitution.

⁴⁸ Section 14 provides that: 'Everyone has a right to privacy, which includes the right not to have
(a) Their person or home searched;
(b) Their property searched;
(c) Their possessions seized; or
(d) The privacy of their communications infringed".

⁴⁹ Rules Regulating the Conduct of the Proceedings of the Supreme Court of Appeal of South Africa R1523 27 November 1998 (Hereinafter referred to as the Rules of the Supreme Court of Appeal Rules).

⁵⁰ Rules 6 of the Supreme Court of Appeal Rules.

Rule 8 obliges parties to file 6 hard-copies. Both are considered a waste of resources when measured against e-technology enhancements.⁵¹ In the same regard Rule 13 does not support serving notice by e-mail or digital e-technology and ought to be reviewed. Rule 17 makes provision for tele-conference, or the use of digital e-technology, only in relation to taxation. These are selected examples that call for a review of the Rules of the Supreme Court.

3.1.3 High Court

The Uniform Rules of Court 26 of 2009⁵² regulate the process followed in the different provincial and local divisions. For example, the rules guide affected parties on the manner upon which proceedings are started; namely if there is sufficient cause of action, the plaintiff approaches the court and the registrar issues summons. Once the registrar issues summons, the sheriff serves the defendant.

Pete *et al* illustrate that after the sheriff serves the document manually or by hand,⁵³ they are further required to issue a certificate of service to confirm that they indeed fulfilled the expected task.⁵⁴ Cilliers *et al* highlight the significance of the sheriffs and the manner in which they are appointed.⁵⁵ For example, they confirm that sheriffs are government employees who are “...*appointed by the deputy sheriff*”.⁵⁶

Much like the researcher’s earlier point, the issuing of summons and later service is still a manual process. Further, the rules require the signature of the attorney of record, or plaintiff, before papers are returned to court. Additionally, if the sheriff does not find anyone at the address cited in the papers, he/she must affix the summons to the door of the defendant’s residence. Upon receiving summons, the defendant may file a notice of intention to defend. Like the service of summons, the process of notice to defend is manual.

⁵¹ Rule 8 of the Supreme Court of Appeal Rules.

⁵² Hereinafter Uniform Rules of Court.

⁵³ Pete *et al* *Civil Procedure a practical guide – procedural law* 52.

⁵⁴ Pete *et al* *Civil Procedure a practical guide – procedural law* 101-102.

⁵⁵ Cilliers AC, Loots C and Nel HC Herbstein & Van Winsen *The Civil Practice of the Superior Courts in South Africa* 5th ed. (Juta Cape Town 1979) 16.

⁵⁶ Cilliers, Loots and Nel *The Civil Practice of the Superior Courts in South Africa* 16.

The same applies to the service of subpoena. Rule 31(1) (b) requires signatures personally, guaranteed by witness, attesting to the validity of such signatures.

From the synoptic outline above, the advancement and implementation of e-technology in civil process will affect the duties and the responsibilities of sheriffs. In terms of the section 3 of the Sheriffs Act 90 of 1996,⁵⁷ sheriffs must serve court documents⁵⁸ and any move towards digital service, or the use of electronic-mail to advance e-technology, will affect civil procedure and the aims of sheriffs. Pete *et al* confirm the main purpose of sheriffs is to effect service of documents used during court proceedings and they refer, for example, to the summons as one of the documents served manually to the respective parties by sheriff.⁵⁹

Currently, sheriffs of the court serve court documents.⁶⁰ Judging however from the development of e-technology, there may in future, be a need to reconsider the existence of sheriffs. By implication, e-technology will affect the future employment of sheriffs and messengers of the court. Further, the way e-technology is advancing implies a future likelihood of digitalization of court documents and processes, which will certainly affect civil procedure, enabling legislation, and rules.

As far as application proceedings are concerned, Rule 6 of the Uniform Rules of Court directs that proceedings begin by filing a notice of motion supported by a founding affidavit.⁶¹ In practice, the process is manual.⁶² Harms, for example, indicates that service in divorce matters must be effected personally except for situations where the defendant's whereabouts are unknown to the plaintiff, in which case substituted service will be effected.⁶³ The rules regulate substituted service.⁶⁴ The same applies for application proceedings. Personal service is required for notice of motion and affidavits, in terms of the Uniform Rules of Court.⁶⁵

⁵⁷ Hereinafter referred to as the Sheriffs Act.

⁵⁸ Section 3 of the Sheriffs Act.

⁵⁹ Pete S *et al Civil Procedure a practical guide – procedural law* 3rd ed. (Oxford University Press Cape Town 2017) 52.

⁶⁰ Uniform Rules of the Court.

⁶¹ Rule 6 of the Uniform Rules of Court.

⁶² Uniform Rules of Court.

⁶³ Harms D *Civil Procedure in Magistrates' Courts* Part C (LexisNexis Durban 2016) C-10.

⁶⁴ Harms D *Civil Procedure in Magistrates' Courts* C-10.

⁶⁵ Uniform Rules of the Court.

Service and filing are not the only examples of manual court processes. Indexing and pagination is, for example, compulsory before set-down for trial.⁶⁶ Ordinarily, candidate attorneys manually paginate and index high and magistrates' court files.⁶⁷

Pete *et al* give a further example of manual process in the form of hypothecs conducted manually.⁶⁸ High court process remains a manual process. There is little sign of simplification of process through e-technology in current law and regulation in South Africa.

3.1.4 Magistrates' Courts

The Magistrates' Courts Act designates the magistrate's court a creature of statute; meaning that this court can only use powers entrenched by the Act.⁶⁹

For example, magistrates' courts have limited jurisdiction in that regional courts can only determine matters for monetary value to a maximum of R 400 000 (four hundred thousand) whilst district magistrates' courts adjudicate matters for monetary value to a maximum of R 200 000 (two hundred thousand).⁷⁰ These courts cannot exceed their powers by allowing parties to split the claim.

Du Plessis *et al* confirm that the powers of magistrates are limited, and they cannot, for example, declare law or conduct invalid. Furthermore, du Plessis *et al* indicate that, if there is dispute before the court where it is alleged that "...the law or conduct is invalid", it must determine the law as if it is valid. Baker *et al* affirm that magistrates' can only exercise powers conferred by the Magistrates' Courts Act and cannot exceed these powers, the process of review ensures this.⁷¹

The relevant section as far as this research is concerned is section 4(4) of the Magistrates' Courts Act. It provides that messengers of the court execute court processes.⁷²

⁶⁶ Uniform Rules of Court.

⁶⁷ Pete *et al* *Civil Procedure a practical guide – procedural law* 256.

⁶⁸ Pete *et al* *Civil Procedure a practical guide – procedural law* 161.

⁶⁹ The Magistrates' Court Act.

⁷⁰ The Magistrates' Court Act.

⁷¹ Baker PWE *et al* Jones and Buckle *The Civil Practice of the Magistrates' Courts in South Africa* 1st ed. (Juta Kenwyn 1974) 30.

⁷² Magistrates' Court Act 32 of 1944.

Furthermore, section 14 sets out specific court documents or processes that messengers execute, namely, summons.⁷³ Erasmus and Van Loggerenberg affirm that messengers exist to carry out court processes within a region or district of the particular court that appointed them.⁷⁴ Furthermore, messengers of the court conduct other processes such as the inventory process, which pertain to automatic rent interdict, manually.⁷⁵ The process provided for by the legislation does not indicate the use of e-technology to ease process and limit resource allocation.

3.2 Influence of e-technology on the civil process and court proceedings

This thesis will determine how e-technology affects the Magistrates' Courts Act, Superior Courts Act, Seventeenth Amendment Act, Sheriffs Act, and the Rules Board for Courts of Law Act. It will further evaluate the impact of e-technology on rules of court to wit the Magistrates' Courts Rules, Uniform Rules of the Court, Supreme Court of Appeal Rules, and Constitutional Court Rules. To achieve this goal, the researcher is required to examine all legislation potentially influenced by any change to the overarching legislative framework for civil procedure in South Africa.

3.3 Other legislation influenced by e-technology

3.3.1 Consumer Protection Act 68 of 2008

Advancement of e-technology effects other legislative instruments that have bearing on civil procedure. For example, some of the provisions of the Consumer Protection Act 68 of 2008⁷⁶ are significant in this regard. These are sections 69, 115 and 118 respectively.

Section 69 enables aggrieved parties to institute proceedings for claims arising from infringement of the rights protected by the Act.⁷⁷

⁷³ Magistrates' Court Act 32 of 1944.

⁷⁴ Erasmus HJ and Van Loggerenberg DE *Jones and Buckle: The Civil Practice of the Magistrates' Courts in South Africa* 8th ed. (Juta Cape Town 1988) 21 – 22.

⁷⁵ Erasmus and Van Loggerenberg *Jones and Buckle: The Civil Practice of the Magistrates' Courts* 117.

⁷⁶ Hereafter referred to as Consumer Protection Act.

⁷⁷ Faris and Hurter *Student Handbook for Civil Procedure* 347.

Section 115 permits parties to pursue civil claims and further highlights issues relating to applicable jurisdiction(s).⁷⁸

The Consumer Protection Act enables the commissioner to issue summons to the party or parties concerned.⁷⁹ Section 118⁸⁰ requires service of court documents, relating to civil procedure,⁸¹ personally to the party concerned or by fax or registered mail.⁸²

The advancement (or legislative acceptance) of e-technology in civil process will affect these provisions.

3.3.2 National Credit Act 34 of 2005

A similar Act that enables parties to commence civil proceedings in accordance with the terms and conditions of a credit agreement, is the National Credits Act 34 of 2005.⁸³

Sections 129 and 130 are relevant to this thesis, as they require parties to give notice to the defaulting party before court proceedings ensue.⁸⁴ Further, section 130 requires the party enforcing the credit agreement to wait 10 business days before commencing civil proceedings.⁸⁵ The ECTA permits parties to commence civil proceedings using e-technology and will affect these provisions. They are therefore in need of scrutiny considering advancing e-technology.

3.3.3 Small Claims Courts Act 61 of 1984

Another legislative instrument pertinent to this thesis is the Small Claims Courts Act 61 of 1984.⁸⁶ The relevant sections in this regard are sections 11 and 29.⁸⁷

⁷⁸ Faris and Hurter *Student Handbook for Civil Procedure* 347.

⁷⁹ The Consumer Protection Act.

⁸⁰ The Consumer Protection Act.

⁸¹ Section 115 of the Consumer Protection Act.

⁸² Section 118 of the Consumer Protection Act.

⁸³ Hereafter referred to as the National Credit Act.

⁸⁴ Section 129 of the National Credit Act.

⁸⁵ Section 130 of the National Credit Act.

⁸⁶ Hereinafter referred to as the Small Claims Courts Act.

⁸⁷ The Small Claims Court Act.

These support processes followed in bringing a claim to the court and are similar to those of the Magistrates Courts' Act; to wit, messengers⁸⁸ of the magistrates' court⁸⁹ manually execute the summons⁹⁰ process.

Having briefly considered the applicable law and rules in the above discussion, it is important to consider relevant e-technology law, and its relation to civil procedure. The Electronic Communications and Transactions Act 25 of 2002⁹¹ is the most important legislation in such consideration.

The ECTA defines electronic technology and regulates the use or application of technology (such as the use of e-mails, electronic signatures, and other electronic communication) in court proceedings.⁹²

4. The Electronic Communications and Transactions Act 25 of 2002 and associated statutes

4.1 Electronic Communications and Transactions Act

Section 1 of the ECTA defines electronic communication as:

“...the emission, transmission or reception of information, including without limitation, voice, sound, data, text video, animation, visual images, moving images and pictures, signals or a combination thereof by means of magnetism, radio or other electronic magnetism waves, optical, electro-magnetic systems or any agency of a like nature, whether with or without the aid of tangible conduct, but not include content service.”

The definition is important as some contemporary civil procedure processes do not fall within the ambit of the meaning in section 1. The term e-technology for this thesis refers to electronic technology extracted from the ECTA provisions.⁹³

⁸⁸ Section 11 of the Small Claims Courts Act.

⁸⁹ The Small Claims Court Act.

⁹⁰ Section 29 of the Small Claims Courts Act.

⁹¹ Hereafter referred to as the Electronic Communications and Transaction Act or ECTA or ECT Act or ECTA.

⁹² Electronic Communications and Transaction Act.

⁹³ E-technology challenges to information privacy
What-when-how.com/...technology/e-technology-challenges-to-information-privacy
(Date of use: 9 February 2017).

E-technology is important in practice. Unlike the past situation of manual codification, typing, and hard-copy recording, legal practitioners now rely almost exclusively on electronic platforms.⁹⁴ Essentially computers have become the vehicle for storage, transmission, receipt, and discovery of documents relating to a civil case.⁹⁵

Legal practitioners are required to protect the privacy of client information.⁹⁶ In order to ensure protection of privacy, practitioners use designed-software providing encryption, to gather data.⁹⁷ This ensures that a key or password is required to access a computer system, data, or information.⁹⁸ This ensures that no one other than the person using the software, or the computer system, has access to the data.⁹⁹ When linked to civil procedure, the information required relates to the cause of action, which leads to trial process.¹⁰⁰ Thereafter, the party may issue summons.¹⁰¹ This process is followed by discovery of relevant information. Subsequently, the parties may conduct a pre-trial conference and thereafter a set-down date for trial proceedings may be requested. In addition, the actual trial proceedings are recorded.¹⁰² There is also an appeal process, where parties who are unsatisfied with the decision of the court may transcribe the recordings which are included in the appeal documents.¹⁰³

Practically, and in terms of legislation the attorney of record signs pleadings.¹⁰⁴ The relevant provisions are sections 13, 17 and 18 of the ECTA.

⁹⁴ E-technology challenges to information privacy
What-when-how.com/...technology/e-technology-challenges-to-information-privacy
(Date of use: 9 February 2017).

⁹⁵ E-technology challenges to information privacy
What-when-how.com/...technology/e-technology-challenges-to-information-privacy
(Date of use: 9 February 2017).

⁹⁶ Security and Privacy issues relating to technology
www.parliament.vic.gov.au/images/stories/committees/.../technology/barisicpaper.pdf
(Date of use: 9 February 2017).

⁹⁷ Security and Privacy issues relating to technology
www.parliament.vic.gov.au/images/stories/committees/.../technology/barisicpaper.pdf
(Date of use: 9 February 2017).

⁹⁸ Security and Privacy issues relating to technology
www.parliament.vic.gov.au/images/stories/committees/.../technology/barisicpaper.pdf
(Date of use: 9 February 2017).

⁹⁹ Security and Privacy issues relating to technology
www.parliament.vic.gov.au/images/stories/committees/.../technology/barisicpaper.pdf
(Date of use: 9 February 2017).

¹⁰⁰ LSSA *Guidelines on the use of internal-based technologies* in legal practice 2015.

¹⁰¹ Bodenstein J *et al Clinical Law in SA* 2006 2nd ed. (LexisNexis Durban) 37 – 50.

¹⁰² Bodenstein J *et al Clinical Law in SA* 2006 2nd ed. (LexisNexis Durban) 37 – 50.

¹⁰³ Pete *et al Civil Procedure – a practical guide procedural law* 3- 328.

¹⁰⁴ The Uniform Rules of the Court and Magistrates' Courts' Rules.

Section 13 regulates the recognition and use of electronic signature and section 17 and 18 set out guidelines on processes relating to notarization, acknowledgement, and certification of certain documents.¹⁰⁵ The provisions of the ECTA accept e-mails used as official documents in court proceedings.¹⁰⁶

Buys describes electronic signatures as the basis of “...*authentication of electronic signature...refers to any kind of connection between an electronic document and the author of the document in question*”.¹⁰⁷ Buys further acknowledges that online alternative dispute resolution should enable parties to reach an agreement that will indicate the place for online mediation and arbitration proceedings.¹⁰⁸ This, in South African law of civil procedure, remains unexplored.

Oraiza discusses methods of discovery by computer and describes this referring to the means of storing information as “*cloud computing*”.¹⁰⁹ Araiza further indicates that cloud computing is a computer system designed to enable computer users to use different networks globally available, for example, internet and Facebook.¹¹⁰

In *Spring Forest Trading v Willberry Pty Ltd SA* the Supreme Court of Appeal determined the validity of electronic-mail and was required to decide whether they form part of an agreement which explicitly required non-variation clauses to be in writing.¹¹¹ The court scrutinized the definition and the meaning of electronic communication and affirmed that, electronic-mail in terms of South African law, is recognised as a valid document and therefore the cancellation of the agreement by e-mail, which was the main reason why this matter was brought to court, was valid and enforceable.¹¹²

¹⁰⁵ Electronic Communications and Transactions Act.

¹⁰⁶ Section 13 of the Electronic Communications and Transaction Act.

¹⁰⁷ Buys R *Cyberlaw @ SA - The Law of internet in South Africa* 2nd ed. (Van Schaick Publishers Pretoria 2004) 13.

¹⁰⁸ Buys *Cyber law @SA - The Law of internet in South Africa* 352.

¹⁰⁹ Oraiza AG ‘Electronic Discovery in the Clouds’ 2011 *Duke Law & Technology Review* 1-19.

¹¹⁰ Oraiza 2011 *Duke Law & Technology Review* 1-19.

¹¹¹ *Spring Forest Trading v Wilberry Pty Ltd* 725 13 SCA para 2-3.

¹¹² *Spring Forest Trading v Wilberry Pty Ltd* 725 13 SCA para 25 -19.

4.1.1 Influence of the Electronic Communications and Transactions Act on court process

Van der Merwe *et al* discuss law relating to e-technology, for example, the significance of the ECTA and RICA and other relevant statutes, and link these to different areas of South African law, which include law of civil procedure and intellectual property rights.¹¹³ Van der Merwe *et al* acknowledge that e-technology is changing and advancing continuously and there is a monumental difference in the effect of e-technology from the day of its introduction to present time.¹¹⁴

In other words, they examine the history of e-technology and its effect on and implications for South African law. They further examine different cases that specifically dealt with e-technology, for example, *Maritz Inc v Cyber Gold Inc* where the court examined the law applicable to jurisdiction in different websites.¹¹⁵ Van der Merwe's views are important in this thesis because they go to the root of the study. E- technology is advancing constantly and there is a possibility that South African civil courts will, in future, operate digitally or through e-technology means. This is, however, unsupported by current enabling legislation and rules. Although advancement of e- technology is demonstrated, for example, by the fact that the court-roll in the Supreme Court of Appeal is available on the court's website,¹¹⁶ the researcher argues that currently the courts are not keeping abreast with e-technology and its enabling legislation.

For example, court files are still paginated manually e-technology means notwithstanding. Pete *et al* allude to the fact that legal representatives, by way of further example, still sign court documents by hand. They acknowledge that technology effects court processes although some legal practitioners still prefer to do this manually as opposed to using e-technology.¹¹⁷ Harms confirms that the ECTA permits electronic signature.¹¹⁸

¹¹³ Van der Merwe DP *et al Information and Communications Technology Law* 2nd ed. (LexisNexis Durban 2016) 24-349.

¹¹⁴ Van der Merwe *et al Information and Communications Technology Law* 24-349.

¹¹⁵ Van der Merwe *et al Information and Communications Technology Law* 190.

¹¹⁶ <http://www.supremecourtofappeal.org.za> (Date of use: 18 January 2018).

¹¹⁷ Pete *et al Civil Procedure a practical guide* 152 – 158.

¹¹⁸ Harms *Civil Procedure in the Magistrates Courts* 38 B-12.

This explicitly affects the rules of court. Currently the rules require signature by legal representatives but do not acknowledge electronic signature.¹¹⁹ There was an attempt made by the Law Society of South Africa to acknowledge the use of electronic communication and signatures in practice. This resulted in mandatory guidelines for legal representatives.¹²⁰

Eiselen indicates that the provisions of the ECTA stem from the provisions of the United Nations Commission on International Trade Law Model,¹²¹ particularly the definition of electronic signature.¹²² Eiselen argues for authentication testing to ensure validity.¹²³ According to Eiselen the test is indicated in Article 7 of the UNCITRAL Model Law. The signature must be “...*identified, authentic, and secured*”.¹²⁴ Eiselen further avers that the definition of signature creates difficulty when compared to section 13 and 15 of the ECTA.¹²⁵ Nieman refers to different methods of analysing, gathering, and storing electronic evidence. She illustrates that these processes should be conducted in a manner that enables the court to admit the same as admissible evidence.¹²⁶

4.1.2 Privacy and protection of court documents

Nieman recommends the manner to enforce the protection of data analysed, gathered, and stored in a computer. The researcher dissects her views in later chapters.¹²⁷ Nieman refers to the protection of cyber-forensic information processed during or after investigation.¹²⁸ Nieman's views are like the views shared by the Law Society, in terms of confidentiality and privacy.

¹¹⁹ The Uniform Rules of Court.

¹²⁰ Uniform Rules of the Court.

¹²¹ Hereinafter referred to UNCITRAL.

¹²² Eiselen S *Fiddling with ECTA – Electronic signatures* Per/ PELJ 2014 2806.

¹²³ Eiselen 2014 Per/ PELJ 2806.

¹²⁴ Eiselen 2014 Per/ PELJ 2808.

¹²⁵ Eiselen 2014 Per/ PELJ 2807.

¹²⁶ Nieman A 'Cyber forensics: Bridging the Law/Technology Divide' 2009 (1) *Journal of Information Law/Technologies (JILT)* 6-11.

¹²⁷ Nieman 2009 *JILT* 16.

¹²⁸ Nieman 2009 *JILT* 19 – 23.

On 6 March 2015, the Law Society of South Africa¹²⁹ passed guidelines on the use of internet-based e-technology in legal practice.¹³⁰ The LSSA guidelines regulate ethical aspects in practice to protect client privacy insofar as data and/or information are concerned.¹³¹ Legal representatives are required to ensure confidentiality in the storage of data.¹³² The guidelines expect legal representatives to avoid disclosing confidential client information or data when communicating “...with other legal professionals”.¹³³ This ensures that legal representative do not un/intentionally waive client-privilege.¹³⁴

The guidelines further necessitate the use of servers within South African borders or jurisdictions to avoid disclosure of client data by extra-territorial jurisdictions.¹³⁵ Legal representatives are further encouraged to keep abreast with foreign law principles relating to the storage and processing of data when invoking cloud computing technologies.¹³⁶ Legal representatives are compelled to take due regard when selecting cloud service providers to ensure that confidential information or data is kept secret and protected.¹³⁷

The Protection of Personal Information Act 4 of 2013¹³⁸ is important because it provides protection from disclosure of personal information within the context of law of privacy.¹³⁹ Provisions, such as section 69, which regulates the manner of transmitting data by means of electronic communication, is considered in subsequent chapters, as it will be affected by the use and advancement of e-technology in future.¹⁴⁰

¹²⁹ Hereinafter referred to as the LSSA of 2015.

¹³⁰ LSSA of 2015 1-8.

¹³¹ LSSA of 2015 1-8.

¹³² LSSA of 2015 1-8.

¹³³ LSSA of 2015 1-8.

¹³⁴ LSSA of 2015 1-8.

¹³⁵ LSSA of 2015 9.

¹³⁶ LSSA of 2015 9.

¹³⁷ LSSA of 2015 12.

¹³⁸ Herein later referred to as the Protection of Personal Information Act or POPI.

¹³⁹ Section 99 of the Protection of Personal Information Act.

¹⁴⁰ Section 69 of the Protection of Personal Information Act.

Related provisions, such as section 99, which sets out civil remedies and defences for those who breach the provisions set out in section 73, are equally important for the purpose of the thesis.¹⁴¹ For example, if the breach results during the performance of duties, a valid defence results. Equally, when the affected parties consent to disclosure, it amounts to a reasonable defence.¹⁴² The provisions of POPI are prudent in any consideration of e-technology in South African civil procedure.

As seen from the above discussion, confidentiality is important in practice particularly during or before the litigation process. De Klerk *et al* argue that legal practitioners ought to disclose all relevant information, including information that may incriminate clients.¹⁴³ This is contrary to confidentiality or privacy rights. De Klerk *et al* further submit that, during application proceedings, it is significant that legal practitioners disclose all relevant information to assist the court to make an informed decision because, during these proceedings, the form of evidence presented to the court is *viva voce*.¹⁴⁴ The researcher will explore De Klerk *et al*'s view, as it is controversial to the protection of clients' rights to privacy considering advancing e-technology.

4.1.3 Privacy relating to South African Revenue Service documents used and stored for civil procedure purposes

The LSSA guidelines further set out the manner that the South African Revenue Service accesses information, data and/or accounting records, kept in electronic form.¹⁴⁵ This is in-line with section 29 of the Tax Administration Act 28 of 2011, as well as Government Notice No 787, which the researcher examines in subsequent chapters.¹⁴⁶

¹⁴¹ Section 99 of the Protection of Personal Information Act.

¹⁴² Section 99 of the Protection of Personal Information Act.

¹⁴³ Bodenstein *et al Clinical Law in SA* 37.

¹⁴⁴ Bodenstein *et al Clinical Law in SA* 37.

¹⁴⁵ LSSA of 2015 11.

¹⁴⁶ LSSA of 2015 12.

5. Purpose of research

The purpose of this research is to interrogate the current adjective court system processes and proceedings from a civil procedure perspective, and to decide whether they are in-line with the advancement of e-technology and e-technology related legislation. Further, the purpose is to determine whether there is a need to create means of ensuring that the processes and proceedings are in-line with the advancement of e-technology. The researcher will prove her results by drafting recommended amendments to the current rules and statutes where relevant to her thesis.

6. Research question

E-Technology is continuously advancing and there appears to be a move towards the use of digital e-technology in court processes and proceedings. The question however remains; what is the impact and extent of the advancement of e-technology in court processes and proceedings, particularly the issuing of summons, serving of court documents, the filing of the pleadings and respective affidavits, discovery, inventory, pagination, indexing of the court files, as well as the actual recording during the court proceedings etc.? Further, is South African law of civil procedure ready and able to implement changes resulting from the advancement of e-technology?

7. Methodology

The researcher uses a desktop research method to consider applicable South African rules and respective legislation. Furthermore, the researcher considers journal articles and international jurisprudence and conducts a comparative inquiry in that regard. The researcher conducts a comparative study between England, the United States of America, Canada, and South Africa as a method to mine information pertinent to satisfying the perceived lacunae in the current South African civil procedure.

7.1 Comparative study

7.1.1 England

England was chosen as a jurisdiction of comparison because the service of court documents is similar to the South African system in that their rules enable parties to serve either “...*personally, by post, by fax, document exchange* [in South Africa referred to as Docex] *as well as electronic communications*”.¹⁴⁷ Further, the LSSA Guidelines mimicked England’s in terms of the use of electronic communication.¹⁴⁸ According to English rules, the court issues and serves court documents and, if the parties wish otherwise, they must advise the court accordingly.¹⁴⁹ The researcher will explore the extent of use of e-technology in England and compare it with the South African adjective court system from a civil process perspective.

7.1.2 The United State of America

The United States of America was chosen as a jurisdiction of comparison because the South African law of civil procedure overlaps as the USA has federal rules in place that regulate the manner in which court documents must be issued, served and filed.¹⁵⁰ In addition, the jurisdiction relies on a statute concerning electronic signature, which is similar to the South African position.

The researcher discusses the decisions and jurisprudential implementation of statutory provision in the context of the chapter relating to the United States of America.¹⁵¹

7.1.3 Canada

Canada was chosen as a jurisdiction of comparison due to her wealth of jurisprudence regarding the use of e-technology during court process.¹⁵²

¹⁴⁷ Grainger I *The Civil Procedure Rules in Action* (Cavendish London 2000) 47.

¹⁴⁸ Grainger I *The Civil Procedure Rules in Action* 47.

¹⁴⁹ Grainger I *The Civil Procedure Rules in Action* 47.

¹⁵⁰ Emanuel *Civil Procedure* 236.

¹⁵¹ *Specht v Netscape Communications Corp* 306 F 3D 17 Court of Appeals 2002.

¹⁵² Bailey J Digitalization of court processes in Canada 2012 Cyber Justice 2012 www.cyberjustice.ca/en/.../digitalization-of-court-processes-in-canada...

For example, there are guidelines in place, drafted by the Canadian Bar, considered by the LSSA when it drafted its guidelines. Further, some Canadian courts recognise the use of Facebook and Twitter in court process.¹⁵³ Further, Canadian courts, are far advanced as far as the use of e-technology in court proceedings is concerned. Filing, for example, takes place electronically.¹⁵⁴ In South Africa by comparison, e-filing is only available to the South African Revenue Services and is not used in the court system *per se* although there are attempts to work towards e-filing.¹⁵⁵ Canada furthermore, invokes digital audio recording in Alberta and Ontario.¹⁵⁶

8. Overview of chapters

The researcher presents her research in five chapters to wit:

8.1 *Chapter one*

Chapter 1 introduces the topic, highlights the different principles, statutes, and rules applicable to the adjective justice system, and thereafter sets out the problem statement.

8.2 *Chapter two*

Chapter 2 analyses relevant South African legislation and/or law applicable in adjective civil justice and the impact of e-technology thereon.

8.3 *Chapter three*

Chapter 3 discusses relevant South African court rules applied in adjective civil justice and the impact of e-technology thereon.

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- (Date of use: 18 November 2016).
- ¹⁵³ Bailey J Digitalization of court processes in Canada 2012 Cyber Justice 2012 www.cyberjustice.ca/en/.../digitalization-of-court-processes-in-canad... (Date of use: 18 November 2016).
- ¹⁵⁴ Bailey J Digitalization of court processes in Canada 2012 Cyber Justice www.cyberjustice.ca/en/.../digitalization-of-court-processes-in-canad... (Date of use: 18 November 2016).
- ¹⁵⁵ South African Receiver of Revenue Services www.sarsefiling.co.za (Date of use: 18 November 2016).
- ¹⁵⁶ Bailey J Digitalization of court processes in Canada 2012 Cyber Justice www.cyberjustice.ca/en/.../digitalization-of-court-processes-in-canad... (Date of use: 18 November 2016).

8.4 Chapter four

Chapter 4 compares the chosen comparative jurisdictions (England, United States of America, and Canada) to seek guidance on the way forward on the implementation of e-technology in civil procedure in South Africa.

8.5 Chapter five

Chapter 5 is the concluding chapter. It sets out recommendations and provides draft proposed amendments to the respective legislation and rules which incorporate advances in e-technology and the relevant provisions of the ECTA.

CHAPTER TWO – SOUTH AFRICAN CIVIL PROCEDURE LEGISLATION AND E-TECHNOLOGY

Chapter preface

In chapter 2 the researcher gives an overview of the interpretation and application of the Electronic Communications and Transactions Act 25 of 2002¹ in the context of the law of civil procedure in South Africa. Thereafter, the researcher examines the degree to which civil procedure legislation follows the ECTA. The aim of the chapter is to review current statutes that regulate law of civil procedure and compare them with e-technology law to decide whether there is compliance in conjunction with e-technology law and its advancement. The chapter seeks to consider applicable and best-methods of interpreting statutes used in law of civil procedure to ensure that it keeps abreast with e-technology law. In this regard, the researcher relies on various methods of statutory interpretation in extending her argument.

1. Introduction

Parliament has passed various statutes that regulate the law of civil procedure and e-technology in South Africa.² The researcher submits that to determine whether these have an impact on the law of civil procedure and her processes, some insight into statutory interpretation and application is necessary.³ Before interpreting any statute, one needs to understand the distinct roles played by Parliament and the courts. It is trite the courts' role is to apply law while Parliament's role is to make law.⁴

¹ Hereinafter ECTA.

² Van de Merwe *et al Information and Communications Technology Law* 107. The laws that regulate civil procedure are: Magistrates' Courts Act, the Superior Courts Act, the Seventeenth Amendment Act, and the Sheriffs Act, as well as the Magistrates' Courts Rules; Uniform Rules of the Court; Supreme Court of Appeal Rules, the Constitutional Court Rules; the Rules Board for Courts of Law Act, Consumer Protection Act and National Credit Act. The e-technology law is the Computer Evidence Act 57 of 1983, ECT and RICA.

³ Cockram GM *Interpretation of Statutes* 3rd ed. (Juta Cape Town 1987) 1-22.

⁴ Currie I and De Waal J *The Bill of Rights Handbook* 6th ed. (Juta Cape Town 2014) 133.

Parliament assists courts in the way the latter interprets statutes as evident in section 39 of the Constitution.⁵ Section 39 requires courts to promote the Bill of Rights when interpreting statutes.⁶ A discussion on the interpretation of statutes, relevant to the law of civil procedure, is important because there is a need to amend some current statutory provisions to enforce the implementation of the ECTA and other law relevant to e-technology.

It is common cause that the law of civil procedure activates whenever there is an infringement of a plaintiff's rights; hence it is important to consider the Bill of Rights in interpreting and applying the law and statutes relevant to the law of civil procedure.⁷ For example, a plaintiff may bring an action when his right to privacy is infringed, and this more often than not occurs in electronic communication such as Facebook or Twitter.⁸ This chapter will consider all relevant statutes and/or the law applicable in civil procedure, and will invoke different methods of interpreting these statutes and thereafter submit a solution for the courts to consider whenever faced with cases requiring interpretation and application of law of civil procedure.

This chapter proceeds from a historical analysis of the ECTA. Thereafter the researcher considers the ECTA provisions relevant to her thesis. She then discusses the ECTA against statutes relevant to civil procedure in South Africa. In specific, the researcher examines the Constitution Seventeenth Amendment Act,⁹ Rules Board for Courts of Law Act,¹⁰ Superior Courts Act,¹¹ Magistrates' Courts Act,¹² Sheriffs' Act,¹³ Divorce Act,¹⁴ Domicile Act,¹⁵ National Credit Act,¹⁶ Small Claims Act,¹⁷ and Consumer Protection Act.¹⁸

⁵ Section 39 of the Constitution.

⁶ Currie and De Waal *The Bill of Rights Handbook* 146- 175

⁷ Currie and De Waal *The Bill of Rights Handbook* 146 – 175.

⁸ Van De Merwe *et al Information and Communications Technology Law* 9 – 137.

⁹ Constitution Seventeenth Amendment Act of 2012.

¹⁰ 107 of 1985.

¹¹ 10 of 2013.

¹² 32 of 1944.

¹³ 90 of 1986.

¹⁴ 70 of 1979.

¹⁵ 3 of 1992.

¹⁶ 34 of 2005.

¹⁷ 61 of 1986.

¹⁸ 66 of 2008.

The chapter further discusses protection of privacy insofar as the application of the ECTA in civil procedure and RICA because this is a concern in situations where parties use e-technology and electronic communication in court process. Interpretation of statutes tries to find a solution to the identified lacunae. The researcher, to achieve this purpose, uses different methods of statutory interpretation throughout this chapter.

2. Synoptic overview of the development of the Electronic Communications and Transactions Act 25 of 2002

Before embarking on an interpretation of the ECTA, it is significant to consider the history of e-technology legislation in South Africa to decide the intention of the legislature.¹⁹ It is common cause that there has been vast development in e-technology from the time Parliament passed the Computer Evidence Act 57 of 1983²⁰ to present day.

The nub of the Computer Evidence Act was to regulate admissibility of computer-generated evidence in civil court proceedings subject to the satisfaction of certain criteria set out in the Act.²¹ For example, computer generated evidence was admitted as evidence in the form of a computer print-out if it conformed to the conditions of an authenticating affidavit set out in section 2.²² Evidence was admissible when it was generated by computer.²³ In addition, data produced by the computer was admissible.²⁴

Today, there are a more e-technology devices and facilities (Skype, Instagram, digital programmes, tablets, Facebook, internet etc.) than in the past.²⁵ If compared these e-technology and facilities devices, are newly developed.²⁶ Instagram, for example, only became widely used recently in South Africa.²⁷

¹⁹ Cockram *Interpretation of Statutes* 1- 21.

²⁰ Hereinafter Computer Evidence Act.

²¹ Preamble of the Computer Evidence Act.

²² Section 1 and 2(1)(a) of the Computer Evidence Act.

²³ Section 2(1)(b) of the Computer Evidence Act.

²⁴ Section 2(1)(b) of the Computer Evidence Act.

²⁵ *CMC Woodworking Machinery v Odendaal Kitchens* Case number 6846/2006 KZN para 1.

²⁶ *CMC Woodworking Machinery v Odendaal Kitchens* para 1-3.

²⁷ *CMC Woodworking Machinery v Odendaal Kitchens* para 1-13.

New digital programmes develop frequently and are important in civil litigation because more often than not, a claim for damages arises out of, for example, pictures, or information posted on Instagram, Facebook, or Twitter and so forth.²⁸ However, during the existence of the Computer Evidence Act, South African courts did not officially admit computer generated evidence unless it met the authenticating requirements set out in the Act. This is clear in *Narlis v Bank of Athens*.²⁹ This decision caused a stir amongst business and affected industry because it went to the heart of business.³⁰

The main issue in *Narlis* related to computer generated bank statements and transactions produced by the Respondent.³¹ The Respondent acted as co-principal debtor for an amount of R 2000 in a surety agreement with Springbok cafe.³² The main issue before the court was whether the principal debtor existed.³³ In coming to its conclusion, the court considered section 34 of the Computer Evidence Act.³⁴ According to the court, a document is admissible when signed and initialled by a person. This act authenticates the document. The court refused to admit the bank statements and transaction records.³⁵

The court decided:

“...Sec. 34 (2) gives to the person presiding at any civil proceedings a discretion to admit, in certain circumstances, certain statements as evidence notwithstanding that the *person* who made them is available but not called, notwithstanding that the original document is not produced, if in lieu thereof a copy of it (or of the material part thereof) is proved to be a true copy. But before that discretion can be exercised, it is essential to note that sec. 34 (2) deals only with such a statement as is referred to in subsec. (1). And straightaway one finds that subsec. (1) refers only to "any statement made *by a person* in a document". (My italics). Well, a computer, perhaps fortunately, is not a person.”³⁶

²⁸ *CMC Woodworking Machinery v Odendaal Kitchens* para 1- 7 and Christianston G and Mostert W 'Digital Signatures' 2000 De Rebus 26.28.

²⁹ *Narlis v SA Bank of Athens* 1976 2 SA 573 A.

³⁰ Van der Merwe *et al Information and Communications Technology Law* 77- 110.

³¹ *Narlis v SA Bank of Athens* 1976 2 SA 573 A.

³² *Narlis v SA Bank of Athens* 1976 2 SA 573 A.

³³ *Narlis v SA Bank of Athens* 1976 2 SA 573 A.

³⁴ *Narlis v SA Bank of Athens* 1976 2 SA 573 A.

³⁵ *Narlis v SA Bank of Athens* 1976 2 SA 573 A.

³⁶ *Narlis v SA Bank of Athens* 1976 2 SA 573 A page 156 of 1976.

Unhappiness over the court's decision resulted in a review of the Computer Evidence Act. The review became necessary to bestow legal validity on evidence produced by a computer. This resulted in the current ECTA.³⁷

Courts are now bound to consider the admissibility of evidence; generated, operated, stored, and distributed by electronic means and e-technology. It appears that in future, civil litigation - from the process of taking instructions from the client up until the actual trial - may be subject to digital control. For this to occur, South African legislation pertinent to civil process must enable such change and development. The ECTA makes some inroads into this need albeit unsupported by civil process legislation and rules.

3. Electronic Communications and Transactions Act 25 of 2002

Before discussing the provisions of the ECTA relevant to this thesis, it is prudent to make a distinction between the ECTA provisions and civil processes and to illustrate the need to amend and modify some provisions of contemporary civil procedure.

Evidence in most cases is submitted in the form of documents, for example, summons, pleadings, and respective notices.³⁸ Before these documents are presented and admissible in court,³⁹ they must comply with certain rules. Of concern however, respective civil procedure statutes and rules do not currently incorporate or enforce the use and application of electronic signatures and the manner of serving these documents more often than not still requires personal service.⁴⁰

This is contrary to the enforcement of the ECTA. This necessitates an amendment to the current statutory provisions, as well as the respective rules, to bring them in-line with the ECTA, which recognises and admits data or computer printouts as evidence in civil proceedings and provides for electronic means of communication.⁴¹

³⁷ Van der Merwe *et al Information and Communications Technology Law* 77- 110.

³⁸ Faris JA & Hurter E *The Student Handbook for Civil Procedure* 7th ed. (LexisNexis 2015) 3- 335.

³⁹ Uniform Rules of Court and the Magistrates' Courts' Rules.

⁴⁰ Erasmus JH and Van Loggerberg DE *Jones & Buckle: The Civil Practice of the Magistrate's Courts in South Africa Vol. 1 The Rules* (10th ed.) (Juta 2017) Rules 5–47.

⁴¹ Section 3 of the Sheriffs Act of 1986 and section 74(Q) of the Magistrates' Courts Act and respective rules of different court, which will be discussed in chapter 3.

The Law Society of South Africa tried, to a certain extent, to address and enforce the ECTA by drafting guidelines on internet-based e-technology in legal practice.⁴² These guidelines highlight the significance of the protection of client data stored by practitioners in compliance with the ECTA. These are discussed in chapter 3.⁴³

Moreover, it is significant to narrow down the meaning of data to determine whether pleadings or statements presented to the court constitute data as defined by the provisions of the ECT Act.⁴⁴ Section 33 of the Civil Proceedings Act 25 of 1965⁴⁵ defines documents as “...any book, map, plan, drawing or photographs and statements that are ‘any representation of fact, whether made in words or otherwise.’”⁴⁶

In the light of the above, the researcher submits that the law of civil procedure remains antiquated and is not abreast with advancing e-technology, particularly in practice. Swales supports this averment and confirms that in future, digitalization will prevail, and that South Africa must embrace e-technology to remain globally competitive. She refers particularly to *Ketler Investment v Internet Service Provider Association*.⁴⁷

In *Ketler*, the Applicant used a service provider, the Respondent.⁴⁸ The issue before the court was alleged defamation of character. The Respondent listed the Applicant on its website (called *Hall of Shame*) as being guilty of spamming.⁴⁹ According to the Applicant, the listing was immoral, wrong, and amounted to defamation of character.⁵⁰ The court applied section 45 of the ECTA, which according to the court allowed spamming. The test applied by the court was whether the listing amounted to “...unsolicited commercial communication” as provided in the section.

⁴² LSSA 2015.

⁴³ LSSA 2015.

⁴⁴ Section 1 of the ECT Act.

⁴⁵ Hereinafter referred to as CPE Act.

⁴⁶ Section 1 of the ECTA.

⁴⁷ Swales 2018 *PER* 1 - 30.

⁴⁸ *Ketler Investment v Internet Service Provider Association* 2014 ALL SA 566 GSJ.

⁴⁹ *Ketler Investment v Internet Service Provider Association* 2014 ALL SA 566 GSJ para 1 -2.

⁵⁰ *Ketler Investment v Internet Service Provider Association* 2014 ALL SA 566 GSJ para 2.

Furthermore, the court acknowledged the advancement of e-technology and held:

“The internet, in the simplest terms, ‘is a worldwide network of computers all connected to each other by telephone lines, cables and satellites’ ...This is consistent with the definition adopted by the ECTA which is the legislation principally concerned with facilitating and regulating electronic communications and transactions. In terms of the ECTA an electronic communication includes an ‘e-mail’ in section 1.”⁵¹

The court subsequently found the listing of the Applicant as a spammer amounted to defamation.⁵² This case is significant because it not only considered the ECTA but also a civil claim relating to the impact of e-technology. Swales further states it is common cause that business operates using internet and other means of e-technology.⁵³ Thus, interpretation of this Act is important because it will assist South African courts to enforce e-technology law or electronic communication regulations.

The important provisions of the ECTA, in the context of this thesis, are section 1,⁵⁴ 2,⁵⁵ 4,⁵⁶ 11,⁵⁷ 12,⁵⁸ 13,⁵⁹ 14,⁶⁰ 15,⁶¹ 27,⁶² 50,⁶¹ and 51⁶² respectively.

As far as section 1 is concerned, one of the important definitions is the meaning of advanced electronic signature because, in practice, a legal representative or the party bringing an action or a claim, must sign all court documents. As indicated earlier, advanced electronic signatures are used rarely because summons is normally signed and issued by hand. The same applies to pleadings and affidavits. The lack of use of advanced electronic signature is attributed to various legislations as well as the rules of the different courts, which presently do not make provision for its use.

⁵¹ *Ketler Investment v Internet Service Provider Association* 2014 ALL SA 566 GSJ para 22.

⁵² *Ketler Investment v Internet Service Provider Association* 2014 ALL SA 566 GSJ para 55.

⁵³ Swales 2015 SALJ 258 – 268.

⁵⁴ Certain definitions are relevant to this thesis.

⁵⁵ The application of the ECTA.

⁵⁶ Legal requirements for data messages.

⁵⁷ Requirement that document should be in writing.

⁵⁸ This section supports methods of confirming authentic signature.

⁵⁹ Admissibility and evidential weight of data messages.

⁶⁰ Acceptance of electronic filing and issuing of documents.

⁶¹ Scope of protection of personal information.

⁶² Principles of electronically collecting personal information.

Eiselen considers the history of electronic signature by examining international jurisprudence before the inception of the ECTA, which will be considered in chapter 4.⁶³ Eiselen argues that the definition provided in the section 1 is problematic.⁶⁴

He concludes that the current definition of electronic signature should be retained but subject to the satisfaction of mandatory requirements.⁶⁵ Buys *et al* acknowledge the need to develop various fields of law to be in-line with the ECTA provisions and other relevant e-technology law.⁶⁶

Section 1 defines advanced electronic signature as:

"...an electronic signature which results from a process which has been accredited by the Authority as provided for in section 37"

Principles of interpretation require the use of the golden rule principle because the definition above is unambiguous. Thus, the grammatical meaning of advanced electronic signature is a signature that conforms to, or complies with, verification and authentication by an accredited authority.

In *Spring Forest Trading v Wilbery*⁶⁷ the court was required to interpret advanced electronic signature and e-mail communication to determine whether cancellation of a rental agreement, which contained a non-variation clause, by e-mail constituted proper cancellation in terms of South African law.⁶⁸ The Supreme Court of Appeal held that advanced electronic signature must identify its holder or owner and "...it is used for accredited 'authentication products and services' which are designed to identify the holder of the electronic signature to other persons".⁶⁹ Van der Merwe *et al* narrow the interpretation of advanced electronic signature arguing that a form of e-technology device must be used to enforce the meaning of advanced electronic signature and this will be accomplished using cryptography.⁷⁰

⁶³ Eiselen 2014 *Per/PELJ* 2806-2809.

⁶⁴ Eiselen 2014 *Per/PELJ* 2806-2809.

⁶⁵ Eiselen 2014 *Per/PELJ* 2806-2809.

⁶⁶ Buys *Cyberlaw @ The Law of Internet in South Africa* 1- 352.

⁶⁷ 725/13 [2014] ZASCA 178.

⁶⁸ *Spring Forest Trading v Wilbery* 725/13 [2014] ZASCA 178 para 21.

⁶⁹ *Spring Forest Trading v Wilbery* 725/13 [2014] ZASCA 178 para 21.

⁷⁰ Van der Merwe *et al Information and Communications Technology Law* 109.

Another definition that is important in civil process, particularly in discovery of evidence, is the meaning of data.⁷¹ The grammatical and contextual meaning in section 1 illustrates that it simply means texts or information produced using a computer.⁷²

This definition is in-line with the POPI Act and is important in discovery of evidence presented in court proceedings. There are rules that describe the way evidence ought to be discovered in civil proceedings as discussed in chapter 3. There appears to be a trend in using e-mails as a means of communication especially in the business sector for many reasons, for instance, it is cheaper to use e-mails than using telephones, and both are used for different reasons in electronic communication.⁷³ This may have some impact on discovery of evidence if such electronic communication is not defined as falling within the meaning of discoverable evidence.

The interpretation of electronic communication, using the grammatical and contextual method of interpretation, appears to indicate that electronic communication refers to the text generated, operated, and distributed by a computer or e-technology, sent by a person who is only intending to communicate with the person(s) receiving such text. This includes e-mail, short messaging services (SMS), and other data necessary for communication between the parties.⁷⁴

Some of the section 2 objectives of the ECTA are relevant to this thesis. Namely, the ECTA sanctions the facilitation of e-technology in all spheres of South African law. For example, it facilitates information that relates to public, private, economic, and social areas,⁷⁵ encourages flexibility towards linking its provisions with international standards,⁷⁶ gears towards supporting admissibility of electronic communications and transactions,⁷⁷ and endorses and allows acceptance of electronic communication.⁷⁸

⁷¹ Section 1 of the ECTA. The Act defines data as electronic representation of information in any form.

⁷² Section 1 of the ECTA.

⁷³ Section 1 of the Electronic Communications Act; Electronic communications is defined in the Act as communication by data messages.

⁷⁴ Cassim F *Use of Electronic Evidence in South African Law: Embracing Technical Change* (CRC Press Parkway 2013) 85 to 93.

⁷⁵ Section 2(1) (a) – (j) of the ECTA.

⁷⁶ Section 2(1) (h) and (m) of the ECTA.

⁷⁷ Section 2(1)(c) of the ECTA.

⁷⁸ Section 2(1)(c) of the ECTA.

Section 2 recognises advancing e-technology by highlighting the significance of regulating electronic communications and transactions entered within South African jurisdiction.

In terms of section 4, the provisions of the ECT Act apply to electronic transactions⁷⁹ and data messages.⁸⁰ The provisions of the ECT Act do not apply in matters relating to the Wills Act,⁸¹ particularly those pertaining to writing⁸² and signature⁸³ as defined in the ECT Act. Furthermore, the provisions relating to the writing⁸⁴ and signature do not apply in Bills of Exchange matters.⁸⁵

Section 11 sets out the requirements for data, or electronic communication and e-technology generated information, to be recognised as official legal documents.⁸⁶ For example, the fact that a computer produces a document does not necessarily mean that it is official information for use in civil court proceedings. This was considered in *Narlis*⁸⁷ before the ECTA came into operation. In this case, the Appellate division refused to admit evidence produced by a computer owned by the Bank of Athens, which proved the existence of the overdraft that was the main cause of action before the court.⁸⁸

Swales argues that electronic communication must be accepted and admitted on face-value by applying the best evidence principle.⁸⁹ Swales states that in the event of a dispute, the courts should accept direct evidence “...from the creator/or receiver of the electronic signature”⁹⁰ in accordance with the best-evidence rule.⁹¹

⁷⁹ Section 4(1) of the ECT Act.

⁸⁰ Section 4(1) of the ECT Act.

⁸¹ Section 4(1) of the ECT Act.

⁸² Section 4(1) of the ECT Act.

⁸³ Section 4(1) of the ECT Act.

⁸⁴ Section 4(1) of the ECT Act.

⁸⁵ Section 4(1) of the ECT Act.

⁸⁶ Section 11 of the ECTA.

⁸⁷ 1976 2 SA 573 A.

⁸⁸ *Narlis v SA Bank of Athens* 1976 2 SA 573 A.

⁸⁹ Swales L ‘The regulation of electronic signatures: time for review and amendment: notes SA’ 2015 *South African Law Journal* Vol. 132 257 – 270 and Schwickard defines the best evidence rule as accepting the original document as the best that ought to be admissible in court.

⁹⁰ Swales SALJ 2015 132 269.

⁹¹ Schwikkard PJ and Van der Merwe SE *Principles of evidence* 4th ed. (Juta Cape Town 2016) 1- 780.

Watney supports the proposition that best-evidence rules apply to admissibility of electronic information.⁹² With respect, the researcher submits that the court in *Narlis* misdirected itself by refusing to accept the statement proving the overdraft because in civil procedure the nature of the claim determines the cause of action. Furthermore, if the main cause of action was the statement of overdraft, which confirmed the breach of contract concluded by the parties, the court should have accepted such evidence unless unlawful generation was proven.

When the ECT Act applies in civil proceedings, it suffices that summons commencing proceedings, stored in a computer, constitutes data, which deserves protection. The same applies to affidavits filed for application proceedings. The subsequent pleadings and all other court documents used during interlocutory proceedings are regarded as data when stored in a computer device.

It is evident that the requirements set out in section 11 of the ECTA are satisfied when all documents are stored and subsequently filed.⁹³ Accordingly, these documents will have legal force required in section 11 of the ECTA. This is because parties to civil proceedings must properly plead the facts and the main cause of action must be explicitly set out in the summons and pleadings. If this does not happen, it results in a special plea or exception raised against the main claim before the court.⁹⁴

Civil proceeding documents must meet the stipulations stated in section 12 of the ECTA. Section 12 states:

...A requirement in law that a document or Information must be in writing is met if the document or Information is:

- a. in the form of a data message; and
- b. accessible in a manner usable for subsequent reference.

Contextual interpretation⁹⁵ illustrates that this is a compulsory provision, meaning that all documents must be in writing.⁹⁶

⁹² Watney *JILT* 2009 2-4.

⁹³ Faris and Hurter *The Student Handbook for Civil Procedure* 3 - 335.

⁹⁴ Pete *et al Civil Procedure a practical guide – procedural law* 52.

⁹⁵ De Sloovere FJ 'Contextual Interpretation of Statutes' 1936 *Fordham Law Review* 219 – 239; According to De Sloovere, contextual interpretation looks at the entire context of statutes and 'common use of language'.

⁹⁶ Section 12 of the ECTA.

It is common cause that summonses, affidavits and pleadings must be reduced to writing and therefore the ECTA applies. Van der Merwe *et al*/ submit that the entity that owns and stores the data must take reasonable steps to ensure that the stored information is readily available in future to conform to this provision.⁹⁷ Grammatical interpretation of the word *must* demonstrates it is a compulsory provision.

Another important section necessitating advanced electronic signature in data is section 13 of the ECTA,⁹⁸ which states:

- (1) Where the signature of a person is required by law and such law does not specify the type of signature, that requirement in relation to a data message is met only if an advanced electronic signature is used.
- (2) Subject to subsection (1), an electronic signature is not without legal force and effect merely on the grounds that it is in electronic form.
- (3) Where an electronic signature is required by the parties to an electronic transaction and the parties have not agreed on the type of electronic signature to be used, that requirement is met in relation to a data message if-
 - a method is used to identify the person and to indicate the person's approval of the information communicated; and
 - b. having regard to all the relevant circumstances at the time the method was used, the method was as reliable as was appropriate for the purposes for which the information was communicated.
- (4) Where an advanced electronic signature has been used, such signature is regarded as being a valid electronic signature and to have been applied properly, unless the contrary is proved
- (5) Where an electronic signature is not required by the parties to an electronic transaction, an expression of intent or other statement is not without legal force and effect merely on the grounds that:
 - a. it is in the form of a data message; or
 - b. it is not evidenced by an electronic signature but is evidenced by other means from which such person's intent or other statement can be Inferred.

The court in *Spring Forest Trading v Wilberry* had to decide whether e-mails sent between the parties were valid or not.⁹⁹ The parties had entered into a rental agreement and there was a default in rental payment a year after signature thereof.¹⁰⁰

In terms of the agreement, parties could not make any changes or cancellations unless made in writing.¹⁰¹

⁹⁷ Van der Merwe *et al* *Information and Communications Technology Law* 115.

⁹⁸ Section 13 of the ECTA.

⁹⁹ *Spring Forest Trading v Wilberry Pty Ltd* 725 13 SCA2014 ZASCA 178 para 1 to 10.

¹⁰⁰ *Spring Forest Trading v Wilberry Pty Ltd* 725 13 SCA para 1 to 29.

¹⁰¹ *Spring Forest Trading v Wilberry Pty Ltd* 725 13 SCA para 1 to 29.

When the Appellant defaulted, the latter sent an e-mail and cancelled the agreement.¹⁰² It was argued that e-mails were not documents regarded as written documents and there was no advanced electronic signature on the e-mail as contemplated by the ECTA; therefore, it did not satisfy the requirements set out in section 13.¹⁰³

The court of first instance analysed section 13 and held that on examining the nature of claim before the court, section 13(1) was not applicable.¹⁰⁴ However, when the court of first instance applied the contextual approach to section 13(3), it held that the requirements were satisfied.¹⁰⁵ The Appellate division corrected this decision.¹⁰⁶ In coming to its conclusion, it considered the authenticity of the signature and affirmed that courts in the past applied a flexible method of accepting a written document or signature instead of a formal method.¹⁰⁷ The appellant division held:

“...There is no dispute regarding the reliability of the emails, the accuracy of the information communicated or the identities of the persons who appended their names to the emails. On the contrary, as I have found earlier, the emails clearly and unambiguously evinced an intention by the parties to cancel their agreements. It ill behoves the respondent, which responded to clear questions by email itself, to now rely on the non-variation clauses to escape the consequences of its commitments made at the meeting on 25 February 2013, which were later confirmed by email...”¹⁰⁸

It appears that the court was correct in deciding that e-mails satisfy the requirements. If one looks at the intention of the party who wrote and sent the e-mail at the time written and sent, the intention was indeed to cancel, even though the agreement contained a non-variation clause.

Section 13 and other relevant provisions of the ECTA apply when e-mails or other electronic communications are generated without fraudulent intention to tamper with the communication in question.

¹⁰² *Spring Forest Trading v Wilberry Pty Ltd* 725 13 SCA para 1 to 29.

¹⁰³ *Spring Forest Trading v Wilberry Pty Ltd* 725 13 SCA para 1 to 29.

¹⁰⁴ *Spring Forest Trading v Wilberry Pty Ltd* 725 13 SCA para 1 to 29.

¹⁰⁵ *Spring Forest Trading v Wilberry Pty Ltd* 725 13 SCA.

¹⁰⁶ *Spring Forest Trading v Wilberry Pty Ltd* 725 13 SCA.

¹⁰⁷ *Spring Forest Trading v Wilberry Pty Ltd* para 1 to 29.

¹⁰⁸ *Spring Forest Trading v Wilberry Pty Ltd* para 29.

Eiselen avers that section 13 deserves critical scrutiny because it is problematic in practice.¹⁰⁹ The researcher supports this argument. As seen from the definition of advanced electronic signature, a holistic or contextual interpretation of section 13, demonstrates that signature on summonses, affidavits, and pleadings will be regarded as a legally binding, when the signature invoked is an advanced electronic signature as defined by the ECTA.¹¹⁰ There is a second leg of the requirement, namely that parties are obliged to agree on the type of signature.¹¹¹ This is demonstrated by the use of the words *must agree*, which infer that agreement is mandatory in order to grant legal validity to electronic signature.¹¹²

On the other hand, if parties do not agree on the type of electronic signature, but have intention to regard it as such, such intention may be construed as a presumption to effect and accept electronic signature. It is submitted that the party arguing the intention of the electronic signature must lead evidence confirming such intention. The defendant on the other hand, must rebut this presumption by leading evidence proving the lack of the intention where applicable.

Van der Merwe *et al* indicate that section 13 must be read with section 37(1) of the ECTA because the latter gives a better explanation as to who can be regarded as an accredited authority.¹¹³ Van der Merwe *et al* refer to section 28 of the ECTA and affirm that the South African Post Office is a service provider that is officially recognised, for example.¹¹⁴

Section 14 provides “...where a law requires information to be presented in its original form”, data message will be in original state, if certain conditions are met as per section 14(1)(a) and (b).¹¹⁵ This indicates that documents produced by a computer, or by other electronic e-technology means, will be original documents in the form of data, provided certain conditions are met.¹¹⁶

¹⁰⁹ Eiselen 2014 *Per/PELJ* 2806-2809.

¹¹⁰ Section 13 of the ECTA.

¹¹¹ Section 13 of the ECTA.

¹¹² Section 13 of the ECTA.

¹¹³ Van der Merwe *et al Information and Communications Technology Law* 116.

¹¹⁴ Van der Merwe *et al Information and Communications Technology Law* 116 – 117.

¹¹⁵ Section 14(1) of the ECTA.

¹¹⁶ Section 14 of the ECTA.

Van der Merwe *et al* interpret this provision to mean that the legislature intended to regulate documents used for litigation purposes as evidence.¹¹⁷ The interpretation and application of this section is contrary to current civil procedure record systems used in different courts.¹¹⁸

Section 14 deals with the originality of data:

- (1) Where a law requires information to be presented or retained in its original form, that requirement is met by a data message if.
 - (a) The integrity of the information from the time when it was first generated in its final form as a data message or otherwise has passed assessment in terms of subsection (2); and
 - (b) that information is capable of being displayed or produced to the person to whom it is to be presented.
- (2) For the purposes of subsection 1(a), the integrity must be assessed.
 - a. by considering whether the information has remained complete and unaltered, except for the addition of any endorsement and any change which arises in the normal course of communication, storage and display;
 - b. in the light of the purpose for which the information was generated; and
 - c. having regard to all other relevant circumstances.

The golden rule interpretation means there is a challenge to enforcement in practice. The original documents for civil proceedings are currently filed manually in the court file.¹¹⁹

When comparing section 14 with the current description of court documents - summonses, pleadings notices of motion and other notices, affidavits, interlocutory proceeding documents¹²⁰ - these will, in future be filed as original documents if they are in the form of data as per the definition in section 1 of the ECTA.¹²¹ In light of this, it is proposed that the current filing system must be reviewed. In future, computer and other e-technology means will conduct filing of original documents. The current rules do not incorporate this possibility.

As far as admissibility of data in future civil proceedings, section 15 of the ECTA must be analysed and properly applied.¹²²

¹¹⁷ Van der Merwe *et al* *Information and Communications Technology Law* 119.

¹¹⁸ Uniform Rules of the Court and Magistrates' Courts' Rules.

¹¹⁹ Uniform Rules of the Court and Magistrates' Courts' Rules.

¹²⁰ Uniform Rules of the Court and Magistrates' Courts' Rules.

¹²¹ Section 1 of the ECTA.

¹²² Section 15 of the ECTA.

Section 15 demonstrates that evidence may not be challenged *per se* simply because it is not hard-copy (and thus original evidence). Section 14 covers the meaning of original data produced by a computer or electronically as illustrated in the above discussion.¹²³ Section 15 indicates that the weight attached to data evidence should be equivalent to the weight attached to original hard-copy evidence in civil proceedings.¹²⁴ In other words, data evidence in civil procedure has the same value and therefore should be admissible subject to the same evidentiary tests.¹²⁵ Section 15 illustrates that all principals pertinent to the law of evidence must be applied to data presented in civil proceedings.¹²⁶

Thus, it appears that the issue as to whether data is authentic and reliable should not preclude the courts in civil proceedings to admit such evidence.¹²⁷ It is argued that this is because once the evidence in the form of data falls within the meaning of data as per the definition, the courts shall be obliged to admit such evidence.¹²⁸ An exception will occur where it is proven that such evidence was generated, stored, and/or produced by fraudulent means, without the knowledge of the parties to civil litigation or proceedings.

¹²³ Sections 14 and 15 of the ECTA.

¹²⁴ Section 15 of the ECTA.

¹²⁵ Section 15 of the ECTA.

¹²⁶ Section 15 states:

- (1) In any legal proceedings, the rules of evidence must not be applied so as to deny the admissibility of a data message, in evidence
 - (a) on the mere grounds that it is constituted by a data message; or
 - (b) if it is the best evidence that the person adducing it could reasonably be expected to obtain, on the grounds that it is not in its original form.
- (2) Information in the form of a data message must be given due evidential weight.
- (3) In assessing the evidential weight of a data message, regard must be had to
 - (a) the reliability of the manner in which the data message was generated, stored or communicated;
 - (b) the reliability of the manner in which the integrity of the data message was maintained;
 - (c) the manner in which its originator was identified; and
 - (d) any other relevant factor.
- (4) A data message made by a person in the ordinary course of business, or a copy or printout of or an extract from such data message certified to be correct by an officer in the service of such person, is on its mere production in any civil, criminal, administrative or disciplinary proceedings under any law, the rules of a self-regulatory organisation or any other law or the common law, admissible in evidence against any person and rebuttable proof of the facts contained in such record, copy, printout or extract'.

¹²⁷ Section 15 of the ECTA.

¹²⁸ Section 15 of the ECTA.

Section 15(4) acknowledges evidence or court documents created by a person in civil proceedings, however if these court documents are stored, distributed and transacted, they must be certified before being converted into data as per the definition in section 1 of the ECTA.¹²⁹ Van der Merwe *et al* argue that section 15 of the ECTA stems from the English law of evidence, which acknowledged and admitted *alternative evidence* where original documents could not be found for whatever reason.¹³⁰ This was then referred to as best-evidence used to assist the court in the decision-making process.¹³¹

Van der Merwe *et al* further narrow the interpretation of section 15 by referring to *Ndlovu v Minister of Correctional Services and Another*.¹³² They compare data evidence and copies of evidence presented before court per section 15.¹³³ As per Gautschi AJ:

“...Documentary evidence, in order to be admissible in evidence, generally has to comply with three rules (a) the statements contained in the document must be relevant and otherwise admissible; (b) the authenticity of the document must be proved; and (c) the original document must normally be produced... Section 15(1) does not, in my view, do away with these three requirements. The data message must be relevant and otherwise admissible, be proved to be authentic and the original be produced, unless (in regard to the latter aspect) section 15(1)(b) applies. Once the data message is admitted in evidence, it must be given due evidential weight (section 15(2)), the assessment of which requires regard to be had to the factors set out in section 15(3).”¹³⁴

Cassim also mentions *Ndlovu* and argues that interpretation of section 15 infers a presumption rebuttable in litigation because “...it creates a presumption that data messages and or printouts are admissible in evidence”.¹³⁵ The researcher submits that, when interpreted from a cyber-law crimes perspective, the presumption is applicable.

The grammatical meaning of data and data messages in terms of the ECTA demonstrates that statements in civil proceedings are regarded as pleadings.

¹²⁹ Section 15(4) of the ECTA. Section 1 defines data as: "data subject" means any natural person from or in respect of whom personal information has been requested, collected, collated, processed or stored, after the commencement of this Act.

¹³⁰ Van der Merwe *et al* *Information and Communications Technology Law* 119.

¹³¹ Van der Merwe *et al* *Information and Communications Technology Law* 119.

¹³² 2006 4 All SA 165 (W).

¹³³ Van der Merwe *et al* *Information and Communications Technology Law* 120, 126 – 206.

¹³⁴ Van der Merwe *et al* *Information and Communications Technology Law* 120, 126 – 206.

¹³⁵ Cassim *Use of Electronic Evidence in South African Law: Embracing Technical Change* 85 to 93; Cassim F Formulating specialized legislation to address the growing spectre of cybercrime: A Comparative Study *PER* 2009 Vol. 12 No. 4 1727 – 3781.

Pleadings, summonses, and affidavits must comply with the requirements set out in section 15 of the ECTA to be admissible as evidence in court. However, a narrow interpretation of section 15 illustrates that pleadings, summonses, and affidavits need not be subject to the requirements of authentic documents or statements, as was the case in *S v Ndiki*.¹³⁶ In *Ndiki*, although a criminal matter, the court dealt with admissibility of electronically generated evidence and considered section 15 of the ECTA provisions. The court held:

“...What section 15 of the ECTA does, is to treat a data message in the same way as real evidence at common law.”¹³⁷

It is argued that the moment pleadings, summonses, affidavits, and all other court documents satisfy the requirements set out in the rules of the respective courts, they should be admissible as real evidence, without necessarily proving their authenticity, and they should be introduced to the court through witnesses at civil trial.

Van der Merwe *et al* state that the meaning of *production* of a document is extracted from law of civil procedure, because for a document to be regarded as such, a legal representative, or any person vested with powers to certify documents in terms of the law, must first certify it.¹³⁸ In civil procedure, a commissioner of oaths must commission all affidavits before they are served on parties and subsequently filed.¹³⁹

This means that any hand-written documents must be certified before being converted data format on a computer or other e-technology device, by scanning and saving as portable document format (PDF).¹⁴⁰ This includes e-technology devices such as memory sticks or flash drives.¹⁴¹

¹³⁶ 2007 2 All SA 185 Ck.

¹³⁷ *S v Ndiki* 2007 2 All SA 185 Ck para 7.

¹³⁸ Van der Merwe *et al Information and Communications Technology Law* 120-122.

¹³⁹ Van der Merwe *et al Information and Communications Technology Law* 120-122.

¹⁴⁰ Herein after referred to as PDF.

¹⁴¹ Section 15(4) off the ECTA; Chow G

Understanding the differences between Adobe Acrobat and Adobe Reader DC

<http://www.lynda.com/Reader-Tutorials/Understanding-differences-between-Adobe-Acrobat-Adobe-Reader-DC-Video/191091/382966-4.html/>

(Date of use: 7 March 2018) and PDF. Three letters that changed the world.

<http://acrobat.adobe.com/us/en/acrobat/about-adobe-pdf.html> (Date of use: 7 March 2018).

The researcher proposes that contextual interpretation of this provision indicates that documents, scanned and saved in PDF format, shall, in future, be considered original data in civil proceedings, as opposed to copies as is the current position. The implication of this is that the court, or any other party to the proceedings, should not challenge validity or authenticity as PDF documents will be regarded as original data and therefore be admitted as evidence in civil proceedings.

Section 27 of the ECTA provides for processes that ought to be followed concerning electronic filing by a public body. Section 27 further illustrates the process that must be followed when documents are issued. Section 27 of the ECTA states:

‘Any public body that, pursuant to any law-

- a. accepts the filing of documents, or requires that documents be created or retained;
- b. issues any permit, licence or approval; or
- c. provides for a manner of payment, may, notwithstanding anything to the contrary in such law–
 - i. accept the filing of such documents, or the creation or retention of such documents in the form of data messages;
 - ii. issue such permit, licence or approval in the form of a data message; or
 - iii. make or receive payment in electronic form or by electronic means.’

Applying the principles of interpretation to section 27 of the ECTA, the Act provides that magistrates’ courts, the high court, and other civil courts are regarded as public bodies.¹⁴²

This is the case because the clerk of the magistrates’ courts and the registrar of the high courts are responsible for issuing, accepting, and filing of court documents such as summons that commences the proceedings, and must thus conform to the ECTA.¹⁴³ This implies that courts must create a system to enable electronic means for issuing of summons and filing of court documents.¹⁴⁴ This court system, according to section 27, must comply with all the requirements of receiving, filing, and storing of data in terms of section 51 and other relevant provisions of the ECTA.¹⁴⁵

¹⁴² Section 27 of the ECTA.

¹⁴³ Section 27 of the ECTA.

¹⁴⁴ Section 27 and section 51 of the ECTA.

¹⁴⁵ The ECTA.

The proposed system should enable parties to access information relating to their matters and track progress. The system should have password encryption used only by those who are party to the proceedings, for example, the clerk of the court and legal representatives. The proposed system should send pop-up e-mails that remind the parties to file subsequent papers. For example, after the plaintiff serves and files a summons, the defendant should receive an automatic e-mail that reminds him/her that notice to defend the matter is due in 10 days in terms of the rules of the respective court.¹⁴⁶

Moreover, manual indexing of court documents, currently required in civil proceedings, must be done away with.¹⁴⁷ The court must create another method of indexing to enable parties to index electronically.¹⁴⁸ The process of issuing summons, filing of documents, and indexing of court files before requesting a set-down date for the civil trial, must in future be in the form of data and electronic means of communication. Naturally, data filed, stored, and distributed in terms of the ECTA¹⁴⁹ deserves privacy protection as provided in the POPI Act.¹⁵⁰

Section 50 states that there must be an agreement concluded with data subjects but this is limited to information that is in data format from inception.¹⁵¹ Van der Merwe *et al* indicate that the meaning of data derives from civil procedure.¹⁵² The application of statutory interpretation, illustrates that data controllers in civil proceedings are attorneys, advocates, and officers of the respective courts.¹⁵³ Van der Merwe *et al* suggest that data controllers may invoke the services of an operator to process data.¹⁵⁴ This means data controllers may outsource this particular service.

¹⁴⁶ Uniform Rules of Court and Magistrates' Courts Rules.

¹⁴⁷ Uniform Rules of the Court and Magistrates' Courts' Rules.

¹⁴⁸ Uniform Rules of the Court and Magistrates' Courts' Rules.

¹⁴⁹ As per the definitions of data controller and data message in section 1 ECTA.

¹⁵⁰ Section 50 of the ECTA and section 9 of the POPI Act.

¹⁵¹ Section 50 of the ECTA.

¹⁵² Van der Merwe *et al* *Information and Communications Technology Law* 121 – 122.

¹⁵³ Uniform Rules of the Court and Magistrates' Courts Rules.

¹⁵⁴ Van der Merwe *et al* *Information and Communications Technology Law* 369.

Data subjects are plaintiffs and defendants because electronic communication or information they share with their legal representatives relates to personal information.¹⁵⁵ This is akin to the attorney-client privilege compulsory in practice.¹⁵⁶ The Law Society drafted guidelines to aid legal practitioners on how they should protect clients' personal information¹⁵⁷ and these will be elaborated in chapter 3.

Section 51 restricts the process of gathering and storage of personal information. It obliges data subjects to keep information necessary for litigation, or any other legal transactions. Data subjects must be informed about the reasons for gathering and storing personal information.¹⁵⁸ The same provision illustrates that attorneys for example, may not disclose client information that was gathered and stored in terms of this Act, unless they are compelled to do so by law.¹⁵⁹ This provision is important because there is a process for discovery of evidence before the actual civil trial takes place - in other words, parties are required to disclose information that will be used for the purpose of trial.¹⁶⁰

This implies that before legal practitioners can disclose a client's personal information, they require written permission from the client, or that they are compelled to comply with certain specific legislation.¹⁶¹ This means that if personal information is relevant, and required at civil trial or any civil proceedings, it must be pleaded, and clients must give permission to the legal representative, in writing, to use the data. Failure to do so will constitute a breach of the provision of section 51 of the ECTA.¹⁶² Analysis of this provision demonstrates that there are four requirements for disclosure of data subjects' personal information.¹⁶³

The first is that there must be written permission; secondly, law must compel the data controller; thirdly, record must be kept containing full particulars of such disclosure, which include, the date of disclosure, including the purpose of such disclosure;

¹⁵⁵ Uniform Rules of the Court and Magistrates' Courts Rules.

¹⁵⁶ Bodestein *et al Clinical Law in SA* 37.

¹⁵⁷ LSSA guidelines November 2014.

¹⁵⁸ Section 51 of the ECTA.

¹⁵⁹ Section 51 of the ECTA.

¹⁶⁰ Pete *et al Civil Procedure a practical guide – procedural law* 52 to 112.

¹⁶¹ De Klerk *et al Clinical Law in SA* 37.

¹⁶² Harms D *Civil Procedure in Magistrates' Courts* C-10.

¹⁶³ van der merwe *et al Information and Communications Technology Law* 121 – 122.

and lastly the duration of the storage (one year in terms of the ECTA) must be stipulated.¹⁶⁴ Section 51(5) of the ECTA must be read together with section 14(4) and section 24¹⁶⁵ of the POPI Act because both provisions deal with processes to be followed after the purpose of collecting, using, and storing data is fulfilled.¹⁶⁶ The interpretation and application of section 51 of the ECTA in civil proceedings illustrates that practitioners must keep record of client information for the duration of the litigation process.

Thus, personal information must be kept until judgment is delivered and payment of the compensation awarded to the client is made or, after the taxation process of the party-on-party costs awarded to the client is finalised, unless there is an appeal of the matter. The researcher submits that it may be difficult to comply with the provisions of section 51 in divorce proceedings. In custody issues the children involved may, for example, be young¹⁶⁷ at the start of the process and it is necessary to keep record until the child/ren reach the age of majority.¹⁶⁸

Nonetheless, the legislation invokes the word *must* in setting out the four requirements in section 51. This is indicative that the requirements are compulsory and cannot be deviated from.¹⁶⁹ Judging from interpretation of this provision there is a need to draft or incorporate a provision that will explicitly address these requirements as far as civil procedure is concerned. Discovery is not the only civil process tacitly affected by this provision.

Subpoena *duces tecum* is also affected because the court may subpoena data controllers to produce personal information contained in a document that must be disclosed during or for civil trial.¹⁷⁰

¹⁶⁴ Section 51(4) and (5) of the ECTA.

¹⁶⁵ Section 24(1)(b) states that:

‘... (b) destroy or delete a record of personal information about the data subject that the responsible party is no longer authorised to retain in terms of section 14...’

¹⁶⁶ Section 14(4) of the POPI Act states that:

‘... (4) A responsible party must destroy or delete a record of personal information or de-identify it as soon as reasonably practicable after the responsible party is no longer authorised to retain the record in terms of subsection (1) or (2)...’

¹⁶⁷ Visser PJ and Potgieter JM Introduction to Family Law 2nd ed. (Juta Cape Town) 206.

¹⁶⁸ Visser and Potgieter *Introduction to Family Law* 206.

¹⁶⁹ Section 51 of the ECTA.

¹⁷⁰ Section 51 of the ECTA and Section 35 of the Superior Courts Act.

Van Tonder argues that the ECTA must be applied flexibly and there should be a level of neutrality in enforcing its provisions.¹⁷¹ This, according to Van Tonder, is accomplished by analysing the principles of law of evidence in instances where there is a dispute regarding authenticity of electronic communication evidence.¹⁷² Araiza discusses electronic discovery and how it should be implemented in practice. Araiza's suggestion is similar to the guidelines drafted by the Law Society of South Africa. These will be discussed and applied in chapter 3.¹⁷³

It is clear from the above that the evolving nature of e-technology (and its enabling legislation) has far reaching implications for civil procedure. The court recognised the evolving nature of e-technology in *CMC Woodworking Machinery v Odendaal Kitchens* wherein it reviewed the history of substituted service from 1947 to date.¹⁷⁴ The court examined the history and evolving nature of e-technology systems that have been used in this procedure, namely "...*telefax, fax machines, cell phones, computers, electronic equipment and digital recordings of the court's proceedings*".¹⁷⁵ The court further considered the amendment of Rule 4A that enables parties to use electronic means of service in order to comply with the ECTA.¹⁷⁶ The court acknowledged advancing e-technology and examined the definition of internet and other social media instruments such as Facebook and the implications of substituted service on Facebook.

The court defined Facebook as a website created to share information and photographs with family and friends. On this website, according to the court, a photo identifies the party. Although this is an invasion of privacy the party can limit access to other individuals. This was enough for the court to grant substituted service via Facebook. The court gave an alternative should the defendant not have access to the internet; the plaintiff could publish the notice in a local newspaper.

¹⁷¹ Van Tonder GP *The admissibility and evidential weight of electronic evidence in South African proceedings: a comparative perspective* (LLM thesis University of the Western Cape 2013) 72.

¹⁷² Van Tonder 2013 EWC 1 to 72.

¹⁷³ Oraiza 2011 *Duke Law and Technology Review* 1 - 8.

¹⁷⁴ *CMC Woodworking Machinery v Pieter Odendaal Kitchens* [unreported case in KwaZulu-Natal High Court Durban Case No. 6846/2006 of 3 August 2012 [Hereinafter referred to as *CMC Woodworking Machinery v Odendaal Kitchens*].

¹⁷⁵ *CMC Woodworking Machinery v Pieter Odendaal Kitchens* para 1.

¹⁷⁶ *CMC Woodworking Machinery v Pieter Odendaal Kitchens* para 1.

This case illustrates a need to amend the current provisions of civil procedure statutes, as well as the rules of court, to keep abreast with e-technology law.

There are certain cases where the Constitutional Court has acknowledged that individuals and businesses breach confidentiality regardless of current laws in place that seek to protect personal information.¹⁷⁷ This was the case in *Bernstein v Bester*¹⁷⁸ where the court analysed the meaning of privacy and the extent of infringement thereof.¹⁷⁹

For example, infringement of privacy will occur when personal information relating to the health status of clients, such as HIV status, and cosmetic surgery or gender reassignment information, is disclosed. The person affected may claim for defamation of character against the defendant who posts or loads pictures of the plaintiff on social media.¹⁸⁰

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- ¹⁷⁷ Section 1 of the POPI Act states:
'personal information' means information relating to an identifiable, living, natural person, and where it is applicable, an identifiable, existing juristic person, Including, but not limited to—
- (a) information relating to the race, gender, sex, pregnancy, marital status, national, ethnic or social origin, colour, sexual orientation, age, physical or mental health, well-being, disability, religion, conscience, belief, culture, language and birth of the person;
 - (b) information relating to the education or the medical, financial, criminal or employment history of the person;
 - (c) any identifying number, symbol, e-mail address, physical address, telephone number, location information, online identifier or other particular assignment to the person;
 - (d) the biometric information of the person;
 - (e) the personal opinions, views or preferences of the person;
 - (f) correspondence sent by the person that is implicitly or explicitly of a private or confidential nature or further correspondence that would reveal the contents of the original correspondence;
 - (g) the views or opinions of another individual about the person; and
 - (h) the name of the person if it appears with other personal information relating to the person or if the disclosure of the name itself would reveal information about the person.'
- ¹⁷⁸ *Bernstein v Bester* NO 1996 2 SA 751 (CC). The Constitutional Court in this case held: '...broad concept of privacy; extending beyond the individual's personal realm; privacy is acknowledged in the truly personal realm, but as soon as a person moves into communal relations and activities, such as business and social interaction, the scope of personal space shrinks accordingly'.
- ¹⁷⁹ *NM v Smith* 2007 (5) SA 250 (CC). The court held that '...the book was published in March 2002. The second respondent confirmed in evidence that the book is truly an authorised biography of herself. Some 5000 copies of the book were printed. The book was distributed to various bookshops during March 2002. Dr Botes bought a copy and after having read the relevant chapters, informed the applicants that their names and HIV status had been disclosed. The applicants denied consenting to the publication of their names and HIV status in the book'.
- ¹⁸⁰ *NM v Smith* 2007 (5) SA 250 (CC).

The Constitutional Court in *NM v Smith* illustrated that jurisprudence guarantees protection of privacy as far as health information, particularly HIV status, and consent ought to be given before disclosure.¹⁸¹ This illustrates that a party whose right to privacy has been infringed has recourse in civil procedure to institute a defamation of character claim against those who disclose personal information using electronic means or e-technology in contravention of the ECTA.

The question however is how does the data subject protect personal information when a subpoena *duces tecum* issued in terms of the ECTA? This question is answered with reference to the definition of personal information contained in the ECTA and POPI Act respectively.¹⁸²

¹⁸¹ *NM v Smith* 2007 (5) SA 250 (CC); *Mistry v Interim National Medical and Dental Council of South Africa* 1998 (4) SA 1127 (CC); and *Magajane v Chairperson North West Gambling Board* 2006 (5) SA 250 (CC).

¹⁸² Section 1 of the ECTA states: "personal information" means information about an identifiable individual, including, but not limited to-

- a. information relating to the race, gender, sex, pregnancy, marital status, national, ethnic or social origin, colour, sexual orientation, age, physical or mental health, well-being, disability, religion, conscience, belief, culture, language and birth of the individual;
- b. information relating to the education or the medical, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved;
- c. any identifying number, symbol, or other particular assigned to the individual;
- d. the address, fingerprints or blood type of the individual;
- e. the personal opinions, views or preferences of the individual, except where they are about another individual or about a proposal for a grant, an award or a prize to be made to another individual;
- f. correspondence sent by the individual that is implicitly or explicitly of a private or confidential nature or further correspondence that would reveal the contents of the original correspondence;
- g. the views or opinions of another individual about the individual;
- h. the views or opinions of another individual about a proposal for a grant, an award or a prize to be made to the individual, but excluding the name of the other individual where it appears with the views or opinions of the other individual; and
- i. the name of the individual where it appears with other personal information relating to the individual or where the disclosure of the name itself would reveal information about the individual, but excludes information about an individual who has been dead for more than 20 years;

For example, personal information relating to health status, sex, or preferences deserves added protection in discovery proceedings, despite the exceptions provided in the ECTA and POPI Act.

This protection is prudent in cases where a person has, for example, undergone gender reassignment and there are photographs taken during the stages of the process. If these photographs are electronically disclosed or published by e-technology or other social media means of electronic communication, without consent from the plaintiff or the person concerned, defamation of character proceedings may be instituted. Once the claim of defamation is instituted, and the defendant wants to prove the truthfulness of such gender reassignment, the latter may ask that the photographs be discovered. If the plaintiff refuses to discover the photographs, the defendant may issue a subpoena *duces tecum* to the surgeon who performed the surgical procedures on the plaintiff.

When the surgeon presents such documents, which confirm the procedure, in court, to comply with the subpoena *duces tecum*, there is a contravention of the ECTA insofar as protection of personal information is concerned, as well as a breach of privacy. It should be borne in mind that there are exceptions provided in the ECTA and it may be argued that the subpoena *duces tecum* complies with the law and therefore such disclosure is justified.

It is, however, argued that there is a need to create, or establish, a test in the rules of discovery to determine the extent of protection against disclosure of personal information in civil proceedings over and above the POPI Act. Boundaries must enforce protection of privacy for those involved in civil litigation. Although it could be argued that discovery is for purposes of law, it is submitted that this is not necessarily so in civil litigation matters. To support the argument above, Van der Merwe *et al* acknowledge the fact that defamation cases arise because of the use of internet and other electronic or e-technology devices.¹⁸³

¹⁸³ Van der Merwe *et al* *Information and Communications Technology Law* 490-512.

The classic case illustrating the application of computer-generated evidence in defamation of character cases, is *Le Roux v Dey*.¹⁸⁴

In this case, high school students created a picture of Dr Dey, who was then a vice principal, and this picture was digitally inserted into pictures of two naked men, which showed private parts.¹⁸⁵ In essence, the digitally created image, suggested that Dr Dey was involved in sexual congress with the men depicted. The image was distributed by cell phone amongst the schoolchildren.¹⁸⁶ Dr Dey was unhappy about the distribution of the pictures and lodged a claim of defamation in the High Court. The High Court examined available defamation defences, and particularly concentrated on the truthfulness and authenticity of the pictures.¹⁸⁷ The court considered that Dr Dey argued in plea, that the pictures were defamatory in nature. The court agreed that the schoolchildren knew what they were doing when they produced the image.¹⁸⁸

The issue of the authenticity of the pictures was never challenged or disputed. The Defendants said the picture was created *as a joke*.¹⁸⁹ The computer-generated picture was accepted as evidence before the court.¹⁹⁰ The High Court awarded R 45 000 compensation because it was convinced that Dr Dey's rights to privacy and dignity had been infringed by the publication of the photo.¹⁹¹ The Defendants referred the matter to the Supreme Court of Appeal on the basis that the two men in the photo had agreed to be photographed whilst having sex.¹⁹²

The Supreme Court of Appeal disagreed with the Defendant's averment. Instead, it confirmed that Dr Dey's rights to privacy had been infringed and thus he was entitled to the compensation awarded to him by the High Court.¹⁹³

The Appellants, still not satisfied by the appeal outcome, referred the matter to the Constitutional Court.

¹⁸⁴ Case CCT 45/10 2011 4 ZACC.

¹⁸⁵ *Le Roux v Dey* 2011 BCLR 577 (CC) para 1- 79.

¹⁸⁶ *Le Roux v Dey* para 1- 79

¹⁸⁷ *Le Roux v Dey* para 1- 79.

¹⁸⁸ *Le Roux v Dey* para 1- 79.

¹⁸⁹ *Le Roux v Dey* para 1- 79.

¹⁹⁰ *Le Roux v Dey* para 1- 79

¹⁹¹ *Le Roux v Dey* para 1- 79.

¹⁹² *Le Roux v Dey* para 1- 79.

¹⁹³ *Le Roux v Dey* para 1- 79.

The Constitutional Court balanced all conflicting rights, thus, the right to privacy,¹⁹⁴ dignity,¹⁹⁵ freedom of expression,¹⁹⁶ and children's rights.¹⁹⁷ After balancing the conflicting rights, the Constitutional Court decided that Dr Dey's right to privacy overrode all other rights.¹⁹⁸ Dr Dey's case is important when considering sections 15 and 51 of the ECTA. The case is a clear illustration of the impact of e-technology in civil procedure. When one analyses advancing e-technology lucrative lawsuits will clearly arise from pictures loaded or posted on Facebook, Twitter, and Instagram. A provision that limits the publication of photographs is needed because publication might take place without necessary permission of the affected person as was the case in *Le Roux v Dey*.

The permission required by section 51 must be strictly implemented because, in future, the situation will worsen when everything is digitalised.¹⁹⁹ Buys *et al* recognise the need for proper application of section 51 of the ECTA.²⁰⁰ Buys *et al* indicate that data used in internet and electronic communication deserves to be protected in complying with the provisions of the ECTA. Internet users, e-technology users and service providers must implement and enforce section 51 of the ECTA.²⁰¹

The researcher submits that the Minister must draft a regulation that sets out strict measures for seeking required permission and apply it in future taking due regard of e-technology devices that currently exist such as CCTV, in order to enforce the requirements of section 51 of the ECTA.

Courts must promote, regulate and the ECTA.²⁰² For example, there may be evidence relating to video-clips collected by CCTV, which show naked pictures of a plaintiff walking around his private property, without his knowledge or permission.

¹⁹⁴ Section 14 of the Constitution.

¹⁹⁵ Section 10 of the Constitution.

¹⁹⁶ Section 16 of the Constitution.

¹⁹⁷ Section 28 of the Constitution.

¹⁹⁸ *Le Roux v Dey* para 1- 79.

¹⁹⁹ Section 51(1) of the ECTA; and Van der Merwe *et al Information and Communications Technology Law* 487.

²⁰⁰ Buys *Cyberlaw @ The Law of Internet in South Africa* 1- 352.

²⁰¹ Buys *Cyberlaw @ The Law of Internet in South Africa* 1- 352.

²⁰² *CMC Woodworking Machinery v Odendaal Kitchens* para 1-13.

The plaintiff in that regard will have grounds to claim for invasion of privacy and defamation of character. In *Mdlongwa v S*,²⁰³ evidence was led showing video footage and photographs taken by CCTV and digital technology to prove guilt and conviction in a robbery case.²⁰⁴

The authenticity of the evidence was challenged but corroborated by oral evidence.²⁰⁵ Thus, there were witnesses who testified to the authenticity of the footage and the digital e-technology used.²⁰⁶ The court was satisfied that the footage evidence, and its identification by the person who downloaded it, was sufficient to prove guilt and conviction and therefore it was admissible.²⁰⁷ Although this case deals with criminal proceedings, it demonstrates that South African courts acknowledge and accept CCTV and digital e-technology evidence, if the latter is identified. This means that a plaintiff who is defamed by pictures or video footage loaded on any social media websites, may in future successfully claim against the defendant for defamation of character. The problem, however, in these instances lies in discovering such pictures and videos clips to raise a defence of truthfulness by the defendant because this will result in an invasion of the plaintiff's right to privacy.²⁰⁸ Neethling *et al* confirm that the defendant in defamation matters may raise truth as a defence.²⁰⁹

There is a need to set boundaries for the extent of the disclosure of pictures and video-clips in civil proceedings. Van der Merwe *et al* agree - “...any act permitting surveillance and monitoring of communication, will, of course raise privacy concerns”.²¹⁰ This is the reason strict rules regulating the discovery process for evidence collected by CCTV, and digital e-technology in civil litigation, should be in place. The researcher proposes same in chapter 5.

²⁰³ *Mdlongwa v S* 2010 (99/10) ZASCA 82.

²⁰⁴ *Mdlongwa v S* 2010 (99/10) ZASCA 82 para 1- 27.

²⁰⁵ *Mdlongwa v S* 2010 (99/10) ZASCA 82 para 1- 27.

²⁰⁶ *Mdlongwa v S* 2010 (99/10) ZASCA 82 para 1- 27.

²⁰⁷ *Mdlongwa v S* 2010 (99/10) ZASCA 82 para 27.

²⁰⁸ Mahmood Rajpoot, & Jensen CD Video Surveillance: Privacy and Legal Compliance in V Kumar, & J Svensson (Eds), Promoting Social Change and Democracy through Information Technology (2015) *IGI global* 1-26.

²⁰⁹ Neethling *et al* *Law of Delict* 256-257.

²¹⁰ van der merwe *et al* *Information and Communications Technology Law* 487.

The ECTA is far reaching and has had a profound impact on various branches of South African law. Below the researcher considers the specific impact on statutes governing civil proceedings in South Africa.

4. Statutes affected by the Electronic Communications and Transactions Act 25 of 2002

4.1 The Constitution Seventeenth Amendment Act of 2012²¹¹

The unamended section 167 of the Act discussed the Constitutional Court structure as well as its staff.²¹² It stated that the Constitutional Court was the highest court that may decide on constitutional matters. The use of the word *may* denoted this provision was not mandatory and hence there was a need to amend to enforce the supremacy of the Constitution. Parliament amended section 167 in 2012 to change court structures in the South African judicial system.²¹³ This amendment emanated from the need to ensure that there is one court of final instance where all constitutional matters are finalised.²¹⁴

Parliament inserted new provisions into the Constitution Seventeenth Amendment Act, which illustrate that the Constitutional Court is now the apex court, meaning that it is the highest court in all constitutional matters.²¹⁵ This puts the decisions of the Constitutional Court above all other decisions, in any matters appealed at the Constitutional Court and affirms the supremacy of the Constitution.²¹⁶

This amendment is important because proceedings in the Constitutional Court are recorded and court documents are still, to a certain extent, managed manually.²¹⁷ This demonstrates that court processes will be impacted by e-technology legislation,

²¹¹ Hereinafter referred to as the Constitution Seventeenth Amendment Act.

²¹² The Constitution Seventeenth Amendment Act.

²¹³ The preamble of the Constitution Seventeenth Amendment Act of 2012.

²¹⁴ Section 3 of the Constitution Seventeenth Amendment Act of 2012.

²¹⁵ Section 3 of the Constitution Seventeenth Amendment Act of 2012.

²¹⁶ Section 2 of the Constitution states: '...This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled'

²¹⁷ Du Plessis M, Penfold G and Brickhill J *Constitutional Litigation* (Juta Cape Town 2013) 25 -41.

particularly the ECTA, which enables courts to conduct court processes using electronic or digital means.²¹⁸ This is further discussed in chapter 3.

4.2 Rules Board for Courts of Law Act 107 of 1985

This Act provides rules enabling the operation of different courts, namely, the superior and lower courts.²¹⁹ It further regulates the way courts conduct their proceedings, for example, the execution of writs, and other court processes.²²⁰ A Board was created in terms of the Act, which reviews all the rules of the respective courts insofar as practice and procedure, including the service of court documents.²²¹ The proposed amendments made in chapter 5 are intended to provide the Board with content to begin the process of aligning the current rules of civil procedure and e-technology law and advancement.

4.3 Superior Courts Act 10 of 2013

The Superior Courts Act repealed the Supreme Court Act 59 of 1959. Parliament decided to pass legislation that would ensure one statute that regulates proceedings in the superior courts.²²² The Superior Courts Act regulates different processes and proceedings in the Supreme Court of Appeal and the high courts.²²³ It further provides for the appointment of court administrators such as judges and other officers of the court responsible for the daily operation of court.²²⁴ It further regulates the manner in which judges should deliver judgments and determines the quorum of the Supreme Court of Appeal and high court.²²⁵ The manner in which these courts should conduct proceedings of the courts and its operations is demonstrated in the rules of courts as discussed in later chapters.

²¹⁸ Constitution Seventeenth Amendment Act of 2012.

²¹⁹ Section 6 of the Rules for Courts of Law of 1985.

²²⁰ Rules Board for Courts Law Act 107 of 1985 [Herein after referred to the RBCL Act].

²²¹ Section 6(1) of the RBCL Act.

²²² The aim or the purpose of the passing the Superior Courts Act 10 of 2013.

²²³ Superior Courts Act.

²²⁴ Section 11 of the Superior Courts Act

²²⁵ Sections 12,13 and 14 of the Superior Courts Act.

The provisions pertinent to the discussion here are sections 34 and 35 of the Superior Courts Act.²²⁶

Section 34 provides that court documents must be certified in order for them to be admissible as evidence before court.²²⁷ A narrow interpretation of this provision proves a gap as far as the enforcement of e-technology law is concerned.²²⁸ The narrow interpretation also applies to the subpoena *duces tecum* principle provided in section 35 of the Superior Courts Act.²²⁹ There is no provision for the use of e-technology in the application of the subpoena *duces tecum* principle; a witness is subpoenaed only to produce the evidence required.²³⁰ If amended in line with the ECTA courts in future will not necessarily require witnesses to make a physical appearance to produce documents or evidence. This implies that section 34 and 35 must be amended to support electronic means of evidence submission without physical appearance at court.

Section 36 requires subpoenaed witnesses to give oral evidence and answer questions asked.²³¹ This section criminalises refusal to comply with the subpoena *duces tecum*²³² in terms of section 36.²³³ The defaulter may be sent to prison if he/she refuses to comply with section 36 subpoena requirements. If he/she continues to refuse, he/she will be imprisoned until he/she complies with section 36.²³⁴

Section 36 demonstrates a gap insofar as accepting digital or video-clips of oral evidence required when a person is subpoenaed in terms of this Act. This means that a provision is required that accommodates digital or video-clips or Skype, or any other e-technology means of communication, whereby a witness may give oral evidence live in court proceedings.

²²⁶ Section 34 and 35 of the Superior Courts Act.

²²⁷ Section 34 of the Superior Courts Act.

²²⁸ Sections 34 and 35 of the Superior Courts Act.

²²⁹ Sections 34 and 35 of the Superior Courts Act.

²³⁰ Section 35 of the Superior Courts Act

²³¹ Section 36(1) of the Superior Courts Act.

²³² Pete *et al* define a subpoena *duces tecum* as meaning 'is the method by which a party is able to obtain access to documents or other items of physical evidence that may be important to his case, when these items are in the possession of persons who are not parties to the case'.

²³³ Section 36(1) of the Superior Courts Act.

²³⁴ Section 36(2) of the Superior Courts Act.

Section 39 deals with examination by interrogatories.²³⁵ Interrogatories²³⁶ refer to a way evidence is brought before court in civil procedure.²³⁷ This means that a commissioner is given questions by the Registrar of the court, which the witness must answer. This happens in instances where a witness is unable to physically appear in court because he/she resides outside the jurisdiction of the court that hears the matter.²³⁸ There are e-technology means of communication such as Skype, CCTV or video conference, and digital e-technology that can be used to expedite the use of interrogatories in court proceedings. For example, the commissioner can enable the witness to give evidence directly through e-technology means of communication and it will then not be necessary to take the question, put by a commissioner, back to the Registrar of the court, as per the current civil processes. A proposed draft amendment of section 39 is provided in chapter 5 to accommodate the use of e-technology in keeping abreast with e-technology and ECTA provisions.

Faris and Hurter affirm that the duties of the sheriffs entail execution of court processes as provided in section 43²³⁹ of the Superior Courts' Act.²⁴⁰

²³⁵

Section 39 states:

'...(a)The Constitutional Court and, in connection with any civil proceedings pending before it, any Division, may order that the evidence of a person be taken by means of interrogatories if –
(a) In the case of the Constitutional Court, the court deems it in the interest of justice; or
(b) In the case of a Division, that person resides or is for the time being outside the area of jurisdiction of the court.

2)Whenever an order is made under subsection (1), the registrar of the court must certify that fact and transmit a copy of his or her certificate of a commissioner of the court, together with any interrogatories duly and lawfully framed which it is desired to put to the said person and the fees and the amount of the expenses payable to the said person for his or her appearance as hereinafter provided.'

²³⁶

Pete *et al* Civil Procedure 697; states that: 'Questions will be put to the witness by a commissioner of the court, who will record the answers of the witness and return this information to the registrar of the court in which the trial is proceeding'.

²³⁷

Section 39 of the Superior Courts' Act and Pete *et al* Civil Procedure 697.

²³⁸

Pete *et al* Civil Procedure 697.

²³⁹

Section 43 states that;

(1) '...The sheriff must, subject to the applicable rules, execute all sentences, judgment, writs, summonses, rules, orders, warrants, commands and processes of any Superior Court directed to the sheriff and must take return of the manner of execution thereof to the court and to the party at whose instance they were issued.

(2) The return of the sheriff or a deputy sheriff of what has been done upon any process of a court, shall be prima facie evidence of the matters therein stated.

²⁴⁰

Faris JA and Hurter E *The Student Handbook for Civil Procedure* 7th ed. (LexisNexis Durban 2015) 27.

This provision may in the future require amendment when action and summons proceedings are commenced and effected via the ECTA. There may not be a need to use the services of sheriffs in future if the rules are amended to incorporate electronic service and return.

More importantly, the return of service that sheriffs are obliged to file after serving court documents to conform to civil proceedings or rules, will not be necessary when e-technology enabled service is implemented. The researcher's draft amendments will illustrate the extent of the need to change the current provisions relating to service of civil proceedings and give guidance on the retention of sheriffs so that they remain in the justice system. For example, there should be a centralised system responsible for the implementation of electronic service of civil proceeding documents and the sheriffs could potentially operate this system. This calls for an amendment to section 43 of the Superior Courts Act. A proposed draft amendment is provided in chapter 5.

Furthermore, the impact of e-technology will affect not only the position of sheriffs, but also other processes conducted by officials of court, for example, the taxation of party-and-party costs by the Registrar. The Registrar of the Superior Courts, as well as the parties awarded party-and-party costs conduct taxation in civil proceedings. The use of e-technology, in future, implies that taxation could be conducted electronically. Naturally this requires amendment of the current rule regarding taxation and verification of the services provided to the client. This will however depend on the type of costs awarded to the successful party.

4.4 Magistrates' Courts Act 32 of 1944

Magistrates' courts are creatures of statutes and their jurisdiction is limited to statute.²⁴¹ There are various provisions of the Magistrates' Courts Act that will be affected by advancing e-technology. The point of departure is section 14, which provides for appointment of sheriffs of the court.²⁴²

²⁴¹ Magistrates' Courts Act.

²⁴² Section 14 of the Magistrates' Court Act.

Messengers of the court previously served and executed court documents but, after amendment, they are now referred to as sheriffs of the court.²⁴³ The position of messengers of the court changed when the Sheriffs Act 90 of 1986 was passed.²⁴⁴ The sheriffs' existence may be affected by implementation of the ECTA, particularly relating to court processes by use of electronic means or e-technology as discussed above.

It is however important to note that advancing e-technology, and a move toward digital e-technology, will in future modify the way sheriffs carry out or execute their duties. Regardless, they should be absorbed into any new system promoting the use of digital or e-technology devices.²⁴⁵ Traditional sheriffs will no longer be necessary if court documents can be served, filed, and executed via electronic means.²⁴⁶ Some sheriffs have extensive experience and service; phasing out their services will have dire consequences to individual sheriffs, their families', and courts. The proposed centralised system for electronic service and return, in compliance with the ECTA, can incorporate sheriffs trained in new ways of serving process. It is prudent to note that the existence of the sheriffs must be preserved to assist in the operation of digital or e-technology used to effect court processes in future.

The same applies to section 17 of the Magistrates' Court referring to evidence that to prove service.²⁴⁷ An electronic system can be used to draft return of service and be distributed electronically instead of preparing a hard-copy certificate of service as proof.²⁴⁸

Sections 31 and 32 provide for automatic rent interdict or hypothec and attachment of property to affect the hypothec.²⁴⁹ Sheriffs and the messengers of the court conduct the process of issuing summons for automatic rent interdict manually. However, there are now provisions in the ECTA that enable electronic means of serving documents.²⁵⁰

²⁴³ Section 14 of the Magistrates' Courts Act.

²⁴⁴ Section 64(2) subsections (a) (b) of the Sheriffs Act 90 of 1986.

²⁴⁵ Swales 2018 SALJ 258 -269.

²⁴⁶ Magistrates' Courts' Act.

²⁴⁷ Section 17 of the Magistrates' Courts' Act.

²⁴⁸ *CMC Woodworking Machinery v Odendaal Kitchens* para 1-13.

²⁴⁹ Sections 30 to 32 of the Magistrates' Courts' Act.

²⁵⁰ Sections 30 to 32 of the Magistrates' Courts' Act.

This implies that the process of issuing summons must be amended to include electronic method of issuing summons, which may be served and filed using e-technology.

Moreover, sections 51 to 54 deserve further scrutiny because they provide the way evidence can be secured in court proceedings.²⁵¹ These sections deal with different methods of ensuring that witnesses testify in court where and when necessary, as is the case in section 43 of the Superior Courts Act.²⁵²

Section 51 provides for subpoena and subpoena *duces tecum* issued when necessary. Section 51 requires witnesses to give evidence and produce documents required by the court in terms of subpoena *duces tecum*.²⁵³ Section 52 deals with the other manner of bringing evidence to court by means of interrogatories as it the case in the Superior Courts Act.²⁵⁴

²⁵¹ Section 51 to 54 of the Magistrates' Courts' Act.

²⁵² Section 51(2) and 54 of the Magistrates' Courts' Act.

²⁵³ Section 51 (2) states:

'...(a) If any person being duly subpoenaed to give evidence or to produce any books, papers or documents in his possession or under his control which the party requiring his attendance desires to show in evidence, fails, without lawful excuse, to attend or give evidence or to produce those books, papers or documents according to the subpoena or, unless duly excused, fails to remain in attendance throughout the trial, the court may, upon being satisfied upon oath or by the return of the messenger that such person has been duly subpoenaed and that his reasonable expenses, calculated in accordance with the tariff prescribed under section 51 *bis*, has been paid or offered to him, impose upon the said person a fine not exceeding R300, and in default of payment, imprisonment for a period not exceeding three months, whether or not such person is otherwise subject to the jurisdiction of the court'.

²⁵⁴ Section 52 states:

(1) Whenever a witness resides or is in a district other than the wherein the case is being heard, the court may, if it appears to be consistent with the ends of justice, upon the application of either party approve of such interrogatories as either party shall desire to have put to such witness and shall transmit the same, together with any further interrogatories framed by the court, to the court of the district within which such witness resides or is.

(2) The last-mentioned court shall thereupon subpoena such witness to appear and upon his appearance shall take his evidence in a manner and form as if he were a witness in a case pending before that court, and shall put to the witness the said interrogatories and such other questions as may seem to it necessary to obtain full and true answers to the interrogatories and shall record the evidence of the witness and shall transmit such record to the court in which such case is pending. The said record shall (subject to all lawful objections) be received as evidence in that case'.

Section 53 facilitates other means of effecting evidence in court through commissions *de bene esse*.²⁵⁵ These are similar to interrogatories.²⁵⁶

Section 54 provides that the court may call upon parties to conduct pre-trial proceedings when the court is of the view that it is necessary to do so²⁵⁷ or when there is a written request for same.²⁵⁸ This involves narrowing down issues and deciding on relevant evidence to be presented during proceedings.²⁵⁹ It also eliminates irrelevant issues and expedites court proceedings.²⁶⁰

This process in practice is conducted through a meeting in a venue decided by the parties and often, the “...conference takes place in the chambers of the most senior advocate involved in a matter”.²⁶¹ These provisions will in future be affected because, for example, there will be no need to subpoena a witness to produce evidence because such evidence can easily be secured electronically.

²⁵⁵ Pete *et al* describe commissions *de bene esse* as a method used when ‘in certain cases it may not be possible, for some reason or other (e.g if the witness is bedridden, or is located in a foreign country), to get a witness to court to testify at the trial of a matter.’

²⁵⁶ Section 53 states:

(1) The court may in any case which is pending before it, where it may be expedient and consistent with the ends of justice to do so, appoint a person to be a commissioner to take evidence of any witness, whether within the Republic or elsewhere, upon the request of one of the parties to such case and after due notice to the other party.

(2) The person so appointed shall put such witness such questions as have been transmitted to him on agreement between the parties, or otherwise shall allow the parties to examine such witness, and any may himself examine such witness as if the witness were being examined in court, and shall record the evidence or cause it to be recorded, whereupon the evidence recorded shall be read over to the witness and shall be signed by him.

(3) The said record shall (subject to all lawful objections) be received as evidence in the case.’

²⁵⁷ Section 54(1) of the Magistrates’ Courts’ Act.

²⁵⁸ Section 54 states that:

(1) The court may at any stage in any legal proceedings in its discretion *suo motu* or upon the request in writing of either party direct the parties or their representatives to appear before it in chambers for a conference to consider-

(a) The simplification of the issues;

(b) The necessity or desirability of amendments to the pleadings;

(c) The possibility of obtaining admissions of facts and documents with a view to avoid unnecessary proof;

(d) The limitation of the number of expert witnesses;

(e) Such other matters as may aid in the disposal of the action in the most expeditious and least costly manner’.

²⁵⁹ Section 54 of the Magistrates Courts Act.

²⁶⁰ Section 54(1)(a) to (e) of the Magistrates’ Courts’ Act.

²⁶¹ Pete *et al* *Civil Procedure* 292.

The same applies for interrogatories; if there is digital evidence, there is no need to use commissioners to ask witnesses questions to gather evidence.²⁶²

Skype, video recording, and tele-conferences, can be used during court proceedings to examine and cross-examine witnesses and evidence. E-technology facilities can be used before, during and after civil trial.²⁶³ It is argued that courts should be required to provide these technologies.

The other significant provision relates to admission of liability, which enables A debtor to pay a debt in instalments through written undertaking.²⁶⁴ This undertaking, according to section 57, must be sent to the debtor by registered mail.²⁶⁵ The researcher avers the use of registered mail must be reconsidered altogether as it has become abrogated by disuse and can be replaced with suitable electronic forms of delivery.

There are other important provisions of the Magistrates' Courts Act that must be amended when narrowly and contextually construed and brought in-line with the ECTA. For example, all provisions that currently require service of court documents or summons by registered mail must be amended to incorporate electronic means of service as provided in the ECTA.²⁶⁶

A narrow interpretation of section 74(4) of the Magistrates' Courts' Act demonstrates a need to amend the manner of effecting service of court documents to be in-line with the ECTA.²⁶⁷ Section 74(Q)(4) of the Magistrates' Courts' Act may also require amendment as it currently requires personal service of rescission of judgment.²⁶⁸ These provisions ought to incorporate electronic means of service and delivery of court documents. A draft of the proposed amendments is provided in chapter 5.

²⁶² *CMC Woodworking Machinery v Odendaal Kitchens* para 1.

²⁶³ *CMC Woodworking Machinery v Odendaal Kitchens* para 1.

²⁶⁴ Sections 57 of the Magistrates' Courts' Act.

²⁶⁵ Section 57 of the Magistrates' Courts' Act.

²⁶⁶ Sections 74(I) (4) and 74Q (4) of the Magistrates Courts Act.

²⁶⁷ Section 74(I)(4) states:

'...An announcement attached order or garnishee order referred to in subsection (3) shall be prepared by the administrator or his attorney, shall be signed by the administrator or his attorney and the clerk of the court, and shall be served on the garnishee by the sheriff by registered post'.

²⁶⁸ Section 74(Q)(4) of the Magistrates' Courts' Act.

4.5 The Sheriffs Act 90 of 1986

The main purpose of passing the Sheriffs Act²⁶⁹ was to create a process for employing sheriffs and enforcing their duties and responsibilities, which include effective service of court documents.²⁷⁰

There is no doubt that sheriffs of the court play a significant role in ensuring that court processes and proceedings run smoothly but there are future implications which will stem from the enforcement of e-technology legislation and will affect the role they currently play in South African courts.²⁷¹ These have been discussed above.

It is important to consider the relevant provisions of the Sheriff's Act. The point of departure relates to sections 2 of the Act.²⁷² Section 2 provides for processes followed to appoint sheriffs.²⁷³ Deputy Sheriffs are appointed by the Minister in consultation with the Board of Sheriffs in the superior and lower courts.²⁷⁴

²⁶⁹ The preamble and purpose of the Sheriffs Act.

²⁷⁰ The preamble and purpose of the Sheriffs Act.

²⁷¹ Sections 2-15 of the Sheriffs Act.

²⁷² Section 2 to 15 briefly provide for processes to be followed when appointing and employing sheriffs, vice sheriffs, members of the board and other staff components to assist with the process performing sheriffs' duties and execution of the court proceedings. For example, section 2 enables the minister to employ sheriffs after consulting with the board and they can attend to the processes 'within the jurisdiction of the superior and the lower courts' that will be decided upon by the minister. This section is very important as the implementation of the ECTA or digital e-technology may warrant for a review of the scope of the sheriffs' duties in so far as the superior and lower courts are concerned. The other important provision for this thesis is section 9 because it relates to the members of the board who are required to be 'fit and proper'. There may a need to review this provision to include an ICT expert or it expert in the board to enforce smooth; proficient running of the new system.

²⁷³ Section 2 and 6 of the Sheriffs Act. Section 2 states:

Section 2 states:

(1) Subject to the provisions of subsection (2), the Minister may appoint in the prescribed manner for a lower or superior court a person as a sheriff of that court...

(3) The same person may be appointed as sheriff of both a lower and a superior court and two or more persons may be appointed as sheriffs of the same court'.

²⁷⁴ Section 6 state that:

(1) Any sheriff or acting may with the approval of the Board and on such conditions as the Board may determine appoint one or more deputy sheriffs, for whom he shall be responsible.

(2) A deputy sheriff may, subject to the directions of the sheriff or acting sheriff appointing him, perform the functions of any such sheriffs or acting sheriff.

(3) Any sheriff or acting sheriff may appoint such other persons in his employ as he may consider necessary'.

Appointment of ordinary sheriffs does not require consultation with the Board.²⁷⁵ Consultation is required in senior positions, such as in the case of appointment of Deputy Sheriffs.²⁷⁶

The existence of the Sheriff's Board will in future be challenged because of advancing technology in relation to the manner of executing their duties. The composition of the Board in future may call for ICT experts as part of the decision-making process to ensure proficiency in running any electronic system created for the purposes of serving court process.

There are other provisions that require sheriffs to conduct themselves professionally in the process of performing their duties.²⁷⁷ For example, before sheriffs can commence their duties, they must be in possession of a fidelity fund certificate to enable them to practice as sheriffs. They cannot commence duties before the fidelity fund certificate is issued²⁷⁸ much like attorneys in practice. Sheriffs are obliged to conduct themselves in a manner desirable and proper; there are consequences in terms of the Act if they do not do so.²⁷⁹ This will also be affected by advancing e- technology. If, for example, service is affected via electronic means, sheriffs cannot be held accountable for system problems or hardware failure. It would be unfair to hold sheriffs responsible for e-technology system glitches where there is evidence from one of the parties to the civil proceeding that confirms that service or attachment of property was affected electronically through digital e-technology.

In essence, sections 43 to 52 of the Sheriffs Act, must be amended to incorporate e-technology service.²⁸⁰

²⁷⁵ Sections 2 of the Sheriffs Act.

²⁷⁶ Sections 6 of the Sheriffs Act.

²⁷⁷ Section 43 subsections (1) and (3) of the Sheriffs Act.

²⁷⁸ Section 30(1)(a) of the Sheriffs Act.

²⁷⁹ Section 43 states:

'... (1) A sheriff shall be guilty of improper conduct if-
(a) he is negligent or dilatory in the service or execution of any process;
(b) he makes a false return in respect of the service or execution of any process;'

²⁸⁰ Sections 43 and 52 of the Sheriffs Act; Section 52 states that:

(1) If in the opinion of the Minister sound reasons exist for doing so, he may authorize any person to charge any sheriff with improper conduct and to inquire into the charge.

These provisions will result in changes to the manner in which return of service is affected, and all other duties that sheriffs are required to execute in civil proceedings.²⁸¹

4.6 Consumer Protection Act 66 of 2008

This Act was drafted to enable parties to first address and deal with their differences before embarking on processes that must be followed in consumer disputes.²⁸² It forces parties to use alternative dispute resolution before the courts are used to resolve disputes.²⁸³ This resulted in the creation of a Tribunal in terms of the National Credit Act, to resolve disputes relating to credit, consumer, and market agreements.²⁸⁴

The main purpose of drafting and passing the Act was to protect the integrity of business and consumers by ensuring processes to resolve disputes arising from commercial agreements.²⁸⁵ The Act enforces international standards that protect consumer rights when involved in commercial international agreements.²⁸⁶ The Act was intended to preserve the rights of historically vulnerable consumers and provide them with efficient remedies.²⁸⁷ The Act provides that when parties do not come to an agreement where there is a conflict they commence proceedings by issuing summons.²⁸⁸

(2) When the Minister authorizes a person under subsection (1) to charge a sheriff with improper conduct, the Board shall forthwith discontinue any steps which the Board has taken against the sheriff in accordance with this Chapter.

(3) A person authorized under subsection (1) shall be invested and charged with the functions relating to a charge of improper conduct assigned to the Board by or under this Chapter, and for the purposes of section 61 a finding made or penalty imposed by that person shall be deemed to be a finding made or penalty imposed by the Board.

(4) Nothing in this section contained shall be construed as empowering the Minister to authorize a person to charge a sheriff with improper conduct after the Board has already made a finding in accordance with this Chapter in respect of the charge in question’.

²⁸¹ Sections 43 of the Sheriffs Act.

²⁸² Section 69 of the Consumer Protection Act.

²⁸³ Section 70 of the Consumer Protection Act.

²⁸⁴ Section 26 of the National Credit Act.

²⁸⁵ The preamble of the Consumer Protection Act.

²⁸⁶ The preamble of the Consumer Protection Act.

²⁸⁷ The preamble (a) and (b) of the Consumer Protection Act.

²⁸⁸ Section 102 of the Consumer Protection Act.

Section 106(1) enables the party who is required to submit information to the Tribunal or Commission to assert that the information is confidential.²⁸⁹

In terms of section 106(2) such a claim must be supported by a written statement explaining why the said information is confidential. A narrow and contextual interpretation of this provision shows a gap in the implementation of sections 50 and 51 of the ECTA. Section 106 may be construed as hindering discovery process available to parties in civil proceedings because, when the information is officially declared confidential in terms of this section, such information may not be used in the proceedings.

This may disadvantage the party declaring the information in future civil proceedings. The court may, in terms of the rules, force the party who has already declared the information confidential in the Tribunal, to disclose such information. In the alternative, the court can dismiss the claim in civil proceedings.²⁹⁰ There is a need to incorporate provisions in this section of the ECTA that will avoid forcing the party to discover information in future civil proceedings, especially in situations where information was declared confidential in Tribunal proceedings.

Section 102 enables the Commissioner to issue summons to a person who can provide evidence during the investigation process.²⁹¹ The manner of service is affected in the same manner as other courts, meaning that the sheriff of the respective court serves the summons.²⁹²

Further, this section requires that a party in possession of documents necessary for the investigation, before and during the Tribunal, must present such documents to the Commission. This is similar to subpoena *duces tecum* discussed earlier in the chapter.²⁹³

²⁸⁹ Section 106(1) of the Consumer Protection Act.

²⁹⁰ Rule 37(7) of the Uniform Rules of the Court.

²⁹¹ Section 102 of the Consumer Protection Act.

²⁹² Section 102(2) of the Consumer Protection Act.

²⁹³ Section 102(1) states: '...At any time during an investigation being conducted in terms of section 72(1)(d), the Commissioner may issue a summons to any person who is believed to be able to furnish any information on the subject of the investigation, or to have possession or control of any book, book, document or other object that has a bearing on that subject –
(a) to appear before the Commission, or before an inspector or independent investigator, to be questioned at time and place specified in the summons; or

The manner of delivery of documents, is not articulated in section 102(1) of the Consumer Protection Act. In addition, there is no accommodation for presenting such documents or books using digital e-technology or electronic communication.²⁹⁴ This calls for a review of this provision to incorporate e-technology and electronic means of effecting civil proceedings. In this regard, the Act should allow delivery by way of e-mails, for example. It is therefore necessary to amend this provision accordingly.

Section 115 provides for processes followed during civil proceedings and determination of jurisdiction.²⁹⁵ It requires parties to file notice commencing proceedings with the clerk of the court.²⁹⁶ The manner of filing such notice however is not provided in this provision and there is no indication that filing can be conducted by electronic means of communication or e-technology. It is the researcher's view that there is a need to amend this provision to incorporate e-technology or electronic means of filing with the clerk of the court.

The same applies to section 118, which deals with the manner of serving documents. In terms of this section, proper service will occur, when the document is delivered to the relevant party, or sent by registered mail to the person's last known address.

The word *must* used in these provisions is important.²⁹⁷ This provision requires scrutiny in that it does not provide for e-technology service, provided for in the ECTA. In fact, it limits service to in-person or registered mail.²⁹⁸ The use of the word *must* demonstrates this provision is mandatory, therefore there is no flexibility regarding its application and enforcement.²⁹⁹ There is a need to amend this provision and incorporate the relevant provisions of the ECTA, as well as the guideline drafted by the LSSA.

(b) to deliver or produce to the Commission, or to an inspector or independent investigator, any book, document or other object referred to in paragraph (a) at a time and place specified in the summons'.

²⁹⁴ Section 102 of the Consumer Protection Act.

²⁹⁵ Section 115 of the Consumer Protection Act.

²⁹⁶ Section 106(3) of the Consumer Protection Act.

²⁹⁷ Section 106(3) of the Consumer Protection Act.

²⁹⁸ Section 118 of the Consumer Protection Act.

²⁹⁹ Section 115 of the Consumer Protection Act.

Interpretation of this provision, considering the intention of the legislature, confirms the gap that is identified in the enforcement of the ECTA as far as civil proceedings and processes are concerned.³⁰⁰ It is observed that the gap is only limited to civil proceedings and the way they are conducted.

4.7 National Credit Act 34 of 2005

This Act came into effect on 1 June 2007. The use or misuse of credit affects many South Africans because the consumer industry is vast. Before the ushering of a democratic government in 1994, it was difficult for most people, who come from disadvantaged backgrounds to access credit. Lack of information on responsible use of credit had drastic impact on many consumers. The Act was promulgated with the aim to educate consumers on how to use and/or manage credit responsibly.

The significant provisions of this Act to law of civil procedure, and the ECTA, are sections 129, 130, 162, 164, and 168.³⁰¹

Section 129(1)(a) requires the lender who has not received payment to first issue notice to the consumer before instituting civil proceedings.³⁰² A narrow and grammatical interpretation of the use of the word *may* is indicative that this is not mandatory.³⁰³ Contextual interpretation however illustrates that section 129(1)(b) makes the process of issuing notice compulsory because it provides that parties may not institute legal proceeding without issuing notice first.³⁰⁴

³⁰⁰ Section 118 of the Consumer Protection Act.

³⁰¹ Section 129 to 169 of the National Credit Act.

³⁰² Section 129 of the National Credit Act.

³⁰³ De Ville J *Constitutional and Statutory Interpretation* 1st ed (Goodwood Western Cape 2000) 1- 94.

³⁰⁴ Section 129(1) states:

(1) If the consumer is in default under a credit agreement, the credit provider-

(a) may draw the default to the notice of the consumer in writing and propose that the consumer refer the credit agreement to a debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction, with the intent that the parties resolve any dispute under the agreement or develop and agree on a plan to bring the payments under the agreement up to date; and

(b) subject to section 130(2), may not commence any legal proceedings to enforce the agreement before-

(i) first providing notice to the consumer, as contemplated in paragraph (a), or in section 86(10), as the case may be; and

(ii) meeting any further requirements set out in section 130.

This provision does not illustrate the way notice should be served or issued to the defaulting debtor. This is problematic because there should have been provisions that relate to how this notice ought to be delivered.³⁰⁵ In *Bubyana v Standard Bank of South Africa Ltd*³⁰⁶ the notice was sent by registered mail to the address that was indicated in the credit agreement, but it was returned. The Constitutional Court considered the importance of issuing notice in terms of section 129 of the NCA and confirmed that notice must be delivered to last known address.³⁰⁷

This is where the enforcement of the e-technology law and legislation comes into operation because these ensure that no matter where the defaulting creditor is situated or resides, he/she will receive the notice.³⁰⁸ How then can the creditor prove to the court that it has taken all the necessary steps to ensure effective delivery of such notice, if the provision itself does provide for other means for the delivery of the notice? Van Heerden and Boraine who interpret section 129(1) of the National Credit Act support this argument.³⁰⁹ They argue that section 129 must be read together with section 168 of the National Credit Act.³¹⁰ Mohale enforces the need to protect consumers by complying with section 129 of the NCA.³¹¹

Section 168 provides that:

‘...Unless otherwise provided in this Act, a notice, order other documents that in terms of this Act must be served on a person will have been properly served when it has been
either –
(a) Delivered to that person; or
(b) Sent by registered mail to that persons last known address...’³¹²

(2) Subsection (1) does not apply to a credit agreement that is subject to a debt restructuring order, or to proceedings in a court that could result in such an order.

(3) Subject to subsection (4), a consumer may at any time before the credit provider has cancelled the agreement, remedy a default in such credit agreement by paying to the credit provider all amounts that are overdue, together with the credit provider's prescribed default administration charges and reasonable costs of enforcing the agreement up to the time the default was remedied.

³⁰⁵ Section 129 of the National Credit Act.

³⁰⁶ *Kubyana v Standard Bank of South Africa Ltd* (unreported case no CCT65/13/20-2014).

³⁰⁷ *Kubyana v Standard Bank of South Africa Ltd* (unreported case no CCT65/13/20-2014).

³⁰⁸ Electronic Communications and Transactions Act.

³⁰⁹ Van Heerden and Boraine 2011 *SAMLJ* 45 0 62.

³¹⁰ Section 168 of the National Credit Act.

³¹¹ Mohale D ‘Protection offered by s129 of the National Credit Act’ 2016 *De Rebus* 23.

³¹² Section 168 of the National Credit Act.

Principles of interpretation show that the use of electronic service was not contemplated. Put differently, the meaning demonstrates that the legislature did not intend to consider electronic service of notice at the time of drafting this statute.³¹³ The provisions themselves are challenging because often people constantly move from one country to another and subsequently immigrate.³¹⁴ It is argued that if people are not aware of notice issued in this regard, and default judgment is subsequently granted against them, they will be prejudiced.

The Constitutional Court confirmed the significance of following section 129 in *Baliso v Firstrand Bank Limited*.³¹⁵ In this case, the notice required in terms of section 129 of the NCA was sent by ordinary mail. The Constitutional Court considered both sections 129 and 130 and held that non-compliance with section 129 was not acceptable and parties therefore could not go ahead with civil litigation, unless they followed these provisions.³¹⁶ It appears that it is insufficient to effect service of notice by mere personal service or by registered mail. There are e-technology laws already in place that must be enforced to avoid prejudice such as the provisions of the ECTA, which, if properly enforced will ensure effective delivery and service.

Section 130 of the Act is equally important. It provides that the creditor can only institute legal proceedings after 20 working days, and 10 working days lapsed since the notice was delivered.³¹⁷ This is once again a challenge because the manner of delivery of the notice in question is not provided and it is evident that the legislature did not have the ECTA in mind when drafting these provisions.

If the legislature had these provisions in mind, it would have permitted and enabled electronic means and other e-technology facilities for delivery of notice.

³¹³ Section 168 of the National Credit Act.

³¹⁴ South Africans move to Australia August 31 2014
<http://www.thesouthafrican.com/South-Africans-moving-to-Australia/> (Date of use: 27 July 2017)

³¹⁵ *Baliso v Firstrand Bank Limited t/a Wesbank* 2017 (1) SA 292.

³¹⁶ The Constitutional Court held that: '...Failure to comply with section 129(1) has only dilatory consequences. The purpose of a notice under section 129(1) is to ensure that proper efforts are made to allow a defaulting consumer to pay off the outstanding debt by way of non-judicial processes. Improper notice only results in the court process being postponed until these extra-judicial court processes are followed and still prove futile or inconclusive'.

³¹⁷ Section 130 of the National Credit Act.

Resultantly, there would be less unknown default judgments against parties where the default was not caused by them. It is evident that these provisions must be amended to incorporate e-technology or electronic means of delivery of the notice to ensure fairness in the civil proceedings. The other important provisions in this Act are section 162 and 164.³¹⁸

Section 162 vests powers on the magistrates' court to impose penalties provided for in section 161.³¹⁹ Section 161 sets out different penalties namely, fines and imprisonment.³²⁰

³¹⁸ Section 164 states:

- (1) Nothing in this Act renders void a credit agreement or a provision of a credit agreement that, in terms of this Act, is prohibited or may be declared unlawful unless a court declares that agreement or provision to be unlawful.
- (2) In any action in a civil court, other than a High Court, if a person raises an issue concerning this Act or a credit agreement which the Tribunal-
 - (a) has previously considered and determined that court-
 - (i) must not consider the merits of that issue; and
 - (ii) must apply the determination of the Tribunal with respect to the issue; or
 - (b) has not previously determined, that court may-
 - (i) consider the merits of that issue, or
 - (ii) refer the matter to the Tribunal for consideration and determination.
- (3) A person who has suffered loss or damage as a result of prohibited conduct or dereliction of required conduct-
 - (a) may not commence an action in a civil court for the assessment of the amount or awarding of damages if that person has consented to an award of damages in a consent order; or
 - (b) if entitled to commence an action referred to in paragraph (a), when instituting proceedings, must file with the registrar or clerk of the court a notice from the Chairperson of the Tribunal in the prescribed form-
 - (i) certifying that the conduct constituting the basis for the action has been found to be a prohibited or required conduct in terms of this Act;
 - (ii) stating the date of the Tribunal's finding; and
 - (iii) setting out the relevant section of this Act in terms of which the Tribunal made its finding.
- (4) A certificate referred to in subsection (3)(b) is conclusive proof of its contents, and is binding on a civil court.
- (5) An appeal or application for review against an order made by the Tribunal in terms of section 148 suspends any right to commence an action in a civil court with respect to the same matter.
- (6) A person's right to damages arising out of any prohibited or required conduct comes into existence-
 - (a) on the date that the Tribunal makes a determination in respect of a matter that affects that person; or
 - (b) in the case of an appeal, on the date that the appeal process in respect of that matter is concluded.
- (7) For the purposes of section 2A(2)(a) of the Prescribed Rate of Interest Act, 1975 (Act No. 55 of 1975), interest on a debt in relation to a claim for damages in terms of this Act will commence on the date of issue of the certificate referred to in subsection (3)(b)'.

³¹⁹ Section 162 states:

'...Despite anything to the contrary contained in any other law, a Magistrate's Court has jurisdiction to impose any penalty provided for in section 161'.

³²⁰ Section 161 states:

'...(a)Any person convicted of an offence in terms of this Act, is liable –for a period not

It is evident that there is a need to amend the above-mentioned provisions of the National Credit Act to ensure they are in-line with the e-technology law, particularly the ECTA.

Section 164 grants the Tribunal jurisdiction to decide on civil matters based on merits.³²¹ A party must choose to resort to the Tribunal or the High Court, but the latter cannot use both in civil action matters.³²² The party who is aggrieved in terms of this Act must file a notice to the Tribunal.³²³

The clerk of the court or the registrar attends to the notice.³²⁴ Where there is consent to an order, parties may not use the provisions of section 164.³²⁵ If one of the parties is not satisfied with the decision of the Tribunal, there is also an appeal process available to such a party.³²⁶ The Tribunal may also charge interest on the debt arising out of the provisions of this Act.³²⁷

4.8 Small Claims Court Act 61 of 1984

The Small Claims Court Act was introduced to enable parties who have claims for lower amounts to use civil process and proceedings. This Act was passed to enable parties, who cannot afford legal fees, to have legal recourse when they have disputes that can be handled by the Small Claims Courts.³²⁸ The Small Claims Courts have limited jurisdiction and the Minister, from time to time, determines the amount in terms of the Act.³²⁹ The amount currently is R 15 000; these courts cannot determine claims that exceed their jurisdiction.³³⁰

exceeding 10 years, or to both a fine and imprisonment; or
(b) in any other case, to a fine or to imprisonment for a period not exceeding 12 months, or to both a fine and imprisonment’.

³²¹ Section 164(2) of the NCA.

³²² Section 164(2) of the NCA.

³²³ Section 164(3) of the NCA.

³²⁴ Section 164(3) of the NCA.

³²⁵ Section 164(3)(a) of the NCA.

³²⁶ Section 164(5) of the NCA.

³²⁷ Section 164(7) of the NCA.

³²⁸ Section 7(1) and (2) of the Small Claims Court Act.

³²⁹ Sections 15 and 16 of the Small Claims Court Act.

³³⁰ Pete S *et al Civil Procedure* 3rd ed (Oxford University Press Southern Africa 2017) 484.

Proceedings are presided over by commissioner and the parties represent themselves.³³¹ It appears that these courts expedite civil litigation and save the time of parties to proceedings.

As in the Magistrate Court, the Small Claims Court uses the services of messengers and the other officers to serve documents necessary for the proceedings.³³² Section 3 of the Small Claims Court Act recognises the use of e-technology devices in that it enables the use of recording of the proceedings.³³³

Another pertinent provision is section 11³³⁴ because it requires messengers of the magistrates' court to perform the same duties in the Small Claims Court.³³⁵ The process followed, for service of summons and court documents, provided for in the Magistrates' Court Act is provided in the Small Claims Court.³³⁶ Section 11 obliges the service of the summons effected personally.³³⁷

Narrow and contextual interpretation of section 29 of the Small Claims Act illustrates the use of the word *shall* shows that personal service is mandatory, and this is contrary to the implementation of the ECTA and the LLSA Guidelines. Section 29 further provides for personal service or registered post service. Again, registered mail service provisions ought to be amended to be in-line with the ECTA.³³⁸ It is further argued that the use of registered mail, to effect service or delivery of court documents, is abrogated by disuse.

Further, it is submitted that most people, even in the rural areas where in the past the use of e-technology was a challenge, developed over time and there are now computers in most areas.³³⁹

³³¹ Section 8 of the Small Claims Court Act.

³³² Rules 8 and 9 of the Magistrates' Courts' Rules and Small Claims Courts Rules.

³³³ Section 3 of the Small Claims Act.

³³⁴ Section 11 (2) states: '...The messenger of the court appointed under the Magistrates' Courts Act, 1944 (Act 32 of 1944), for the magistrate's court of a district, shall act as messenger of the court for a court in that part of the said district falling within the area of jurisdiction of that court'.

³³⁵ Section 11 of the Small Claims Act.

³³⁶ Rules 4 and 13 of the Rules Regulating matters in respect of small claims court of April 1991.

³³⁷ Section 11 of the Small Claims Act.

³³⁸ Small Claims Act.

³³⁹ ICT access still a major challenge in rural areas
www.hsrc.ac.za/en/review/hsrc-review-july-2013/ict-access-still-a-major-challenge-in-rural-areas (Date of use: 20 October 2017).

Further, the registered mail service should be done away with to enforce ECTA provisions, unless there is no internet available in an area of jurisdiction. Registered mail however should only be used by in exceptional circumstances.³⁴⁰ Accordingly, chapter 5 provides draft amendments for the Small Claims Act to assist in the implementation of the e-technology law and the ECTA.

4.9 Divorce Act 70 of 1979

This Act was passed to amend the law that regulates divorce proceedings.³⁴¹ It was passed to expedite processes incidental to divorce proceedings.³⁴² The Act sets out grounds for jurisdiction,³⁴³ and the grounds that assist the court to decide on the divorce before court.³⁴⁴ It further highlights the process followed when assets are divided.³⁴⁵

The relevant provision relating to the implementation of e-technology law in divorce matters is section 11 of the Divorce Act. Section 11 states that the procedure applicable shall be prescribed, from time to time, by the rules of courts.³⁴⁶ A contextual interpretation of this provision is problematic because it does not necessarily recognise other procedures regulated by other statutes such as ECTA. The rules and necessary amendments will be discussed in chapter 3. Draft proposed amendments are provided in chapter 5.

³⁴⁰ *CMC Woodworking Machinery v Odendaal Kitchens* para 1.

³⁴¹ The preamble of the Divorce Act 70 of 1979 [Hereinafter referred to as the Divorce Act].

³⁴² The preamble of the Divorce Act 70 of 1979 [Hereinafter referred to as the Divorce Act].

³⁴³ Section 2 of the Divorce Act.

³⁴⁴ Sections 3 -4 of the Divorce Act.

³⁴⁵ Section 7 of the Divorce Act.

³⁴⁶ Section 11 states that: '...The procedure applicable with reference to a divorce action shall be the procedure prescribed from time to time by the rules of court'. It is important to note that the respective court referred to in the Act in civil proceedings matters are High Courts and Regional Courts in civil proceedings matters and this means uniform rules of court and magistrates' courts' rules determine the process referred to in section 11 of the Divorce Act and these rules are discussed in chapter 4.

4.10 Regulation of Interception of Communications and Provision of Communication-related Information Act of 2002³⁴⁷

RICA was created to regulate processes relating to interception and monitoring of electronic communications.³⁴⁸ For example, electronic communication may be intercepted when one of the parties is directly or indirectly involved in such communication,³⁴⁹ or when the interception is conducted after notice was issued regarding such interception.³⁵⁰ It further provides for conditions upon which electronic communication may be intercepted and monitored, for example, interception may be conducted, when a person gives consent to such interception.³⁵¹ RICA also provides for prohibition on disclosure of information³⁵² and further illustrates a process for creating a centre for interception.³⁵³ RICA regulates telecommunication interception relating to radio frequency.³⁵⁴

The link between RICA and civil procedure is demonstrated and confirmed when legal representatives communicate with clients via e-mail and this is well illustrated in *Spring Forest* discussed earlier in this chapter. E-mails or electronic communication shared between client and legal representative fall within the ambit of the meaning of data as defined in section 1 of the ECTA. It is therefore important to consider the relevant provisions applicable to law of civil procedure and decide the need to amend the rules in-line with RICA.

When compared to law of civil procedure, section 4 applies to the interception of communication shared between attorney and his/her client, together with the communication shared with the defendant's legal representative.³⁵⁵

³⁴⁷ Hereinafter referred to as RICA.

³⁴⁸ The preamble of RICA.

³⁴⁹ The preamble and section 4 of RICA.

³⁵⁰ The preamble and section 6 of RICA.

³⁵¹ Section 5(1) of RICA.

³⁵² Section 42 of RICA.

³⁵³ Section 52 of RICA.

³⁵⁴ The preamble and section 11 of RICA.

³⁵⁵ Interpretation of section 4 of RICA and Mabeka University of Western Cape 2008 39 -40. Mabeka NQ *When does the conduct of an employer infringe on an employee's constitutional right to privacy when intercepting electronic communications?* (University of the Western Cape 2008) 1 -137. Mabeka argues that: Section 4 of RICA provides for interception of communication by a party to such communication. Section 5 of RICA provides employers may intercept employees' electronic communication if such employees consent to such interception. This section provides that:

A grammatical and narrow interpretation of this provision proves that it allows legal representatives to conduct necessary interception when they are involved in civil litigation.³⁵⁶

In practice, legal representatives share e-mails, and exchange documents, such as pleadings and affidavits, electronically as these are necessary for civil trials or litigation.³⁵⁷

The contextual interpretation of RICA therefore denotes that the authenticity of e-mails or pleadings or affidavits should not be challenged during the actual civil trial proceedings, if they were lawfully generated. Van der Merwe *et al* support this averment as far as the interception of electronic communication is concerned.³⁵⁸ Buys *et al* also discuss the meaning and the application of RICA provisions in cyber law.³⁵⁹ Buys *et al* suggest that digital e-technology should be used to facilitate effective alternative dispute resolution, and this will enable parties to a dispute to resolve disputes expeditiously.³⁶⁰

Section 5 of RICA,³⁶¹ is linked with section 51 of the ECTA because they both require consent before interception commences.³⁶²

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- (1) Any person, other than a law enforcement officer, may intercept any communication if one of the parties to the communication has given prior consent in writing to such interception, unless such communication is intercepted by such person for purposes of committing an offence. Section 5(1) is pertinent because it denotes the likelihood of an invasion of an employee's right to privacy by an employer, when the latter monitors employees' electronic communications. Section 6(1) of RICA discussed *infra* addresses the issue of consent to a certain extent, as RICA requires the system controller to take all reasonable steps to inform the user of a telecommunication system that indirect communication may be intercepted or the interception may be permitted by the expressed or implied consent. Most academic writers embrace the notion that consent in the employment law context is incorporated in employment contracts or employer's policies. The courts have concluded that there is no infringement of the right to privacy where one party consents to the interception. It had been found by South African courts and the CCMA that an employee may not claim a protection of the right to privacy, if there are policies in place.

³⁵⁶ Section 4 of RICA.

³⁵⁷ Uniform Rules of the Courts and the Magistrates Courts Rules.

³⁵⁸ Van der Merwe *et al* *Information and Communications Technology Law* 78 - 99.

³⁵⁹ Buys *Cyberlaw @ The Law of Internet in South Africa* 352 and Burns Y Communications Law 1st ed (Butterworths Durban 2001) 1- 50.

³⁶⁰ Buys *Cyberlaw @ The Law of Internet in South Africa* 352.

³⁶¹ Section 5(1) states; '...Any person, other than law enforcement officer, may intercept any communication if one of the parties to the communication has given prior consent in writing to such interception, unless such communication is intercepted by such person for purposes of committing an offence'.

³⁶² Section 5 of RICA and section 51 of ECTA.

Comparison between section 5 of RICA and section 51 of ECTA implies that consent, in future civil proceedings, should not only be between legal representatives and their clients; but is also required from officials of the court who will be working with data.

As illustrated in the argument under the ECTA in this chapter, there are also privacy challenges in RICA provisions.³⁶³ Section 6 of RICA³⁶⁴ provides for tacit consent and notification of electronic communication.

Applying the principles of interpretation to section 6 of RICA, denotes that this provision also applies in law of civil procedure.³⁶⁵ For example, contracts, lease agreements, and other agreements entered by the parties concerned may be documented electronically.

When these are exchanged between parties by electronic means, they can be used to prove breach of contract. The breach affirms the main cause of action in civil proceedings. It is argued that electronic communication relating to breach should be admissible in court proceedings.

³⁶³ Van der Merwe et al *Information and Communications Technology Law* 78 -487.

³⁶⁴ Section 6(1) states:

- ‘... (1) Any person may, in the course of the carrying on of any business, intercept any indirect communication –
- (a) By means of which a transaction is entered into in the course of that business;
 - (b) Which otherwise relates to that business; or
 - (c) Which otherwise takes place in the course of the carrying on of that business, in the course of its transmission over telecommunication system.
- (2) A person may only intercept an indirect communication in terms of subsection (1) –
- (a) if such interception is effected by, or with the express or implied consent of, the system controller;
 - (b) for purposes of –
 - (i) monitoring or keeping a record of indirect communications –
 - (aa) in order to establish the existence of facts;
 - (bb) for purposes of investigating the unauthorised use of that telecommunication system; or
 - (cc) where that part of, the effective operation of the system; or
 - (ii) monitoring indirect communications made to a confidential voice-telephony counselling or support service which is free of charge, other than the cost, if any, of making a telephone call, and operated in such a way that users thereof may remain anonymous if they so choose;
 - (c) if the telecommunication system concerned is provided for use wholly or partly in connection with that business; and
 - (d) If the system controller has made all reasonable efforts to inform in advance a person, who intends to use the telecommunication system concerned, that indirect communications transmitted by means thereof may intercept or if such indirect communication is intercepted with the express or implied consent of the person who uses that telecommunication system’.

³⁶⁵ De Ville *Constitutional and Statutory Interpretation* 1- 94.

It appears that proof of electronic communication should be accepted and admitted as authentic regardless of the lack of consent to such interception. Van der Merwe *et al* show that RICA applies when there is evidence produced and shared between individuals.³⁶⁶

5. Rules of Statutory Interpretation and enforcement of the Electronic Communications and Transactions Act 25 of 2002

The Interpretation of Statutes Act 33 of 1957 is crucial to understanding and interpretation of various laws including the ECTA. This Act aims at giving guidance to courts to interpret statutes, regulations and rules drafted and applied by courts.³⁶⁷ This means that courts must ensure that the meaning of statutes, regulations and rules demonstrate the intention of the legislature at the time the statutes, regulations and rules were drafted.³⁶⁸

For example, the Act defines the meaning of *writing* as including typewriting, and the word *writing* is used in most statutes as seen in the ECTA provisions.³⁶⁹ The Act also guides the courts to interpret the way the number of days ought to be calculated in respective courts following the respective rules of court.³⁷⁰

This Act was passed to aid courts to interpret law and legislation.³⁷¹ Its provisions apply to courts mentioned in section 1.³⁷²

³⁶⁶ Van der Merwe *et al* *Information and Communications Technology Law* 78 -487.

³⁶⁷ Section 1 of the Interpretation Act.

³⁶⁸ Section 1 and 8 of the Interpretation Act.

³⁶⁹ Section 3 of the Interpretation Act. This section states that: '...In every law expressions relating to writing shall, unless the contrary intention appears, be construed as including references to typewriting, lithography, photography and all other modes of presenting or reproducing words in visible form'.

³⁷⁰ Section 4 of the Interpretation Act. This sections states: '...when any particular number is prescribed for the doing of any act, or for any other purpose, the same shall be reckoned exclusively of the first and inclusive of the last day, unless the last day happens to fall on a Sunday or on any public holiday, in which case the time shall be reckoned exclusively of the first day and exclusively also of every such Sunday or public holiday'.

³⁷¹ The preamble and section 1 of the Interpretation Act 33 of 1957.

³⁷² Section 1 states: '...The provisions of this Act shall apply to the interpretation of every law (as in this Act defined) in force, at or after the commencement of this Act, in the Republic or any portion thereof, and to the interpretation of all by-laws, rules, regulations or orders made under the authority of any such law, unless there is something in the language or context of the law, by-law, rule, regulation or order repugnant or unless the contrary intention appears therein'

Section 7³⁷³ of the Interpretation of Statutes Act is important in civil proceedings because it narrows down the meaning of words such as *serve*, *give*, *send*. These words are used when court documents are served. Electronic-mails sent to the other party constitute data text that must be protected in terms of the ECTA. The word *give* is used when clients are required to *give* consent to the disclosure of their personal information as provided in section 51 of the ECTA.

This provision further deals with the manner of *service by post* and affirms that if court documents are served by post, they will be regarded as if the other party has received them.³⁷⁴ In the law of civil procedure, parties are required to serve court documents to the other party and this service can be effected by registered mail.³⁷⁵ The different rules of the High Court and the Magistrates' Court also permit parties to serve by registered post as illustrated in *Kubyanav Standard Bank* discussed earlier in this chapter.³⁷⁶

There are various views expressed by scholars on the correct manner and method of interpreting statutes, such as de Ville *et al.*³⁷⁷ Cockram states that the intention of the legislation must be considered when interpreting statutes.³⁷⁸ These views are enforced in section 12 of the Interpretation Act.³⁷⁹ Section 1 of the Interpretation Act provides that its provisions apply to the interpretation to all South African law.³⁸⁰

Du Plessis confirms that there are different theories of interpreting statutes.³⁸¹

³⁷³ Section 7 states that: '...Where any law authorizes or requires any document to be served by post, whether the expression 'serve' or 'give', or 'send', or any other expression is used, then, unless the contrary intention appears, the service shall be deemed to be effected by properly addressing, prepaying, and posting a registered letter containing the document, and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post'.

³⁷⁴ Section 7 of the Interpretation of Statutes Act.

³⁷⁵ *Nkata v FirstRand Bank Limited and Others* 2016 (4) SA 257 (CC) para 14; Harms *Civil Procedure in the Magistrates Courts* 38 B-12.

³⁷⁶ Rule 4 of the Uniform Rules of Court; Rule 9 of the Magistrates' Courts' Rules and Harms *Civil Procedure in the Magistrates Courts* 38 B-12.

³⁷⁷ De Ville *Constitutional and Statutory Interpretation* 1- 94.

³⁷⁸ Cockram *Interpretation of Statutes* 1.

³⁷⁹ Hereinafter referred to as the Interpretation Act. Section 12 states: '... (1) Where a law repeals and re-enacts with or without modifications, any provision of a former law, references in any other law to the provision so repealed shall, unless the contrary intention appears, be construed as references to the provision so re-enacted'.

³⁸⁰ Interpretation Act 33 of 1957.

³⁸¹ Du Plessis *et al Re-interpretation of statutes* 2-7.

Du Plessis' point of departure is that words in statutes ought to be given their ordinary meaning by looking at dictionary meaning - this is referred to as the golden rule principle.³⁸²

The golden rule principle is described as "...to determine and give effect to the intention of the legislature, and that this is to be derived from the ordinary grammatical meaning of the language of the legislature unless this would lead to absurdity that could not have been intended".³⁸³

The Supreme Court of Appeal in *Van Heerden v Joubert* affirmed this³⁸⁴ when the Appellate Division had to interpret the Inquest Act 58 of 1959 to determine cause of death of a stillborn baby. The court stated:

"...The general rule in the construction of statutes is that the ordinary grammatical meaning of the words used must be adhered to"³⁸⁵

The application of this principle was affirmed in *S v Ndiki*.³⁸⁶ The court had to interpret section 15 to determine whether computer generated evidence fell within the ambit of hearsay evidence in terms of section 3 of the Law of Evidence Amendment Act 45 of 1988.³⁸⁷ The court in deciding the admissibility of the evidence in question, held that words should be construed according to their grammatical meaning.³⁸⁸ This finding is supported by Legwala and Ngwenya.³⁸⁹ In *Ndlovu v Minister of Correctional Services*,³⁹⁰ the court interpreted section 15(1)(a) and (b) to consider whether evidence produced by a computer could be admissible.³⁹¹

³⁸² Du Plessis *et al* *Re-interpretation of statutes* 2-9.

³⁸³ General 2150 Interpretation of Statutes January 2013 – Issue 160
<http://www.saica.co.za/integrtax/2013/2150-Interpretation-of-Statutes.htm>
(Date of use: 21 October 2017.)

³⁸⁴ *Van Heerden v Joubert* 1994 2 All SA 468 (A).

³⁸⁵ *Van Heerden v Joubert* 1994 2 All SA 468 (A) para 8. The appellant division in paragraph 9 went on and held that 'where the language of a statute is unambiguous and its meaning clear the court may only depart from the ordinary meaning of it if it leads to absurdity so glaring that could never have been contemplated by the legislature'.

³⁸⁶ *S v Ndiki* 2007 2 All SA 185 Ck.

³⁸⁷ *S v Ndiki* 2007 2 All SA 185 Ck para 7.

³⁸⁸ *S v Ndiki* 2007 All SA SA 185 Ck para 17.

³⁸⁹ Legwala and Ngwenya A (Pty) Ltd v The Commission for South African Revenue
<http://www.dejure.up.ac/index..php/volumes/46-volume-4-2013/36-volume/46-volume-4-2013/212-caselaw1> (Date of use: 22 October 2017).

³⁹⁰ *Ndlovu v Minister of Correctional Services* 2006 JOL 17037 (W).

³⁹¹ *Ndlovu v Minister of Correctional Services* 2006 JOL 17037 (W) para 18. The court in this case found that: '...Purpose of the legislature was probably to free as much computer-generated

Further, statutes can be literally construed by having due regard to the intention of the legislature.³⁹² Du Plessis indicates that statutes can also be contextually interpreted by reading them as a whole and considering the context upon which they were written by the legislature.³⁹³

Willis on the other hand, argues that there are three ways of construing statutes, to wit “*the literal rule meaning plain meaning; the golden rule; and the mischief rules*”.³⁹⁴ In *Mogotho v Security Systems*,³⁹⁵ the court had to consider whether there was a gap in the provisions of the Trade Disputes Act 14 of 1997. The court applied the mischief rule and confirmed:

“...the purpose of the legislation is the prevailing factor in interpretation. The text, context and objectives of the Act are taken into account to establish the purpose of legislation’. ...The mischief rule includes the application of external aids, ie the law prior to the problem in question, defects in the law and the mischief that was intended to be addressed by the legislation.”³⁹⁶

It appears that there are different approaches expressed by courts and legal scholars. However, both seem to indirectly concur that the aim is to show the intention of the legislature when interpreting statutes. It appears that there is no specific or prescribed method that must be invoked, and the court must interpret statutes holistically on a case-by-case basis. If one draws an analogy from these scholars and jurisprudence, it emerges that the courts must use their discretion to apply a suitable method in a given scenario. Put differently, statutes must be construed according to the merits of the case before court.

Before starting with the interpretation phase, it is important to consider relevant provisions of the Constitution.

evidence from the hearsay trap as could be justified without doing violence to the important value served by the exclusionary rule’.

³⁹² Du Plessis *Re-interpretation of statutes* 93 – 94.

³⁹³ Du Plessis *Re-interpretation of statutes* 97; Finch and Fafinski *Legal Skills* 77. These two scholars, namely, Finch and Fafinski argue that ‘the mischief rule (the rule of Heydon’s case) involves an examination of the former laws in attempt to deduce Parliament’s intention’. Finch and Fafinski further state that mischief refers to a gap in the legislation that should have been avoided when the legislation was passed to repeal previous ones and the make a distinction between the golden rule and mischief and they are that only difference is that the latter looks at the reasons for passing the piece of legislation.

³⁹⁴ Will Statute Interpretation in a nutshell 322.

³⁹⁵ *Mogotho v Security Systems* 2003 (1) BLR IC.

³⁹⁶ *Mogotho v Security Systems* 2003 (1) BLR IC page 5.

It is trite that section 2 of the Constitution provides that the Constitution is the supreme law of South Africa.³⁹⁷ This section also provides that if there is any law or law that is not in-line with its provisions, it will be declared unconstitutional.³⁹⁸ This was illustrated in the case of *S v Makwanyane*³⁹⁹ where the Constitutional Court declared the death penalty unconstitutional after it had been an appropriate sanction for murder cases for decades.⁴⁰⁰ The Constitutional Court upheld the supremacy of the Constitution by declaring the death penalty unconstitutional and undeserving of the protection entrenched in the Bill of Rights.⁴⁰¹

Subsequent decisions enforced this supremacy as evident in *Glenister v President of the Republic of South Africa and Others*, wherein the court had to decide on the constitutionality of the decision Cabinet took to phase out the Scorpion's.⁴⁰² The Constitutional Court affirmed that the court had powers vested upon it to declare any conduct, including decisions taken contrary to its provisions, unconstitutional.⁴⁰³

If for whatever reason there is an infringement of any part of the provisions of the Constitution, particularly the Bill of Rights, such an infringement will be regarded as inconsistent and will therefore be declared unconstitutional.⁴⁰⁴

Another provision of the Constitution important in law of civil procedure is section 8 because it applies to all, including private individuals who are often involved in civil litigation or disputes.⁴⁰⁵

³⁹⁷ Section 2 states that: '...This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled'.

³⁹⁸ Section 2 of the Constitution.

³⁹⁹ *S v Makwanyane* 1995 3 SA 391 (CC).

⁴⁰⁰ *S v Makwanyane* 1995 3 SA 391 (CC).

⁴⁰¹ *S v Makwanyane* 1995 3 SA 391 (CC).

⁴⁰² *Glenister v President of the Republic of the South Africa* 2009 1 SA 287 CC para 31 to 37.

⁴⁰³ *S v Makwanyane* 1995 3 SA 391 (CC); *Executive Council of the Western Cape Legislature v President of the Republic of South Africa* 1995 (4) SA 877 (CC).

⁴⁰⁴ *Glenister v President of the Republic of the South Africa* para 31.

⁴⁰⁵ Section 8 states that:

- (1) The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.
- (2) A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.
- (3) When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court—
 - (a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and

This implies that whenever the courts are faced with civil claims where there is evidence that confirms an infringement of the plaintiff's rights, as articulated in the Bill of Rights, the court will uphold the supremacy of the Constitution as seen in *S v Makwanyane*. This argument is offered because disputes stemming from law of civil procedure also fall within the ambit of section 8, together with all other relevant provisions of the Constitution.⁴⁰⁶ This means section 8 binds the parties to the law of civil procedure.

Section 39 of the Constitution is also relevant to this discussion. It provides that:

- ... (1) When interpreting the Bill of Rights, a court, tribunal or forum –
- (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
 - (b) must consider international law; and
 - (c) may consider foreign law.
- (2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.
- (3) The Bill of Rights does not deny the existence of any other rights of freedoms that are recognised or conferred by common law, customary law or legislation, to the extent they are consistent with the Bill.

Currie and de Waal argue that section 39 demands that the courts promote the rights entrenched in the Bill of Rights when interpreting statutes, by ensuring that the values of Constitution are considered.⁴⁰⁷

Cockram opines that the courts must examine the intention of the legislature when interpreting statutes.⁴⁰⁸ When applying Cockram's views in the interpretation of the Bill of Rights, and taking cognisance of section 39, it is significant to consider the intention of Parliament in passing the legislation or statute when it passed section 39. It appears that the intention of the legislature can better be understood by looking at the history of the said legislation.

(b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1).

(4) A juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person.

⁴⁰⁶ Section 8 (2) of the Constitution.

⁴⁰⁷ Currie and de Waal *The Bill of Rights Handbook* 146.

⁴⁰⁸ Cockram *Interpretation of Statutes* 1- 21.

Before the final constitution was passed, an Interim Constitution was passed, and it contained a method courts had to apply when interpreting the Bill of Rights.⁴⁰⁹

The choice of words used in section 35⁴¹⁰ of the Interim Constitution (such as *shall* as opposed *must*) now contained in section 39, indicate that these provisions are mandatory.⁴¹¹ The use of these words show that Parliament wanted to ensure promotion of values.⁴¹² Section 166 of the Constitution established different court structures in their order of seniority.⁴¹³

The Highest Court is the Constitutional Court,⁴¹⁴ followed by the Supreme Court of Appeal,⁴¹⁵ High Court,⁴¹⁶ Magistrates' Courts in different regions and districts.⁴¹⁷

⁴⁰⁹ *S v Makwanyane* 1995 3 SA 391 (CC); 32 -47; *Executive Council of the Western Cape Legislature v President of the Republic of South Africa* 1995 (4) SA 877 (CC); *Bernstein v Bester NO and Others* 1996(2) SA 751 (CC); *Minister of Police v Kunjana* 2016 SACR 473 (CC).

⁴¹⁰ Section 35 of the Interim Constitution states:

'... (1) In interpreting the provisions of this Chapter a court of law shall promote the values which underlie an open and democratic society based on freedom and equality and shall, where applicable, have regard to public international law applicable to the protection of the rights entrenched in this Chapter, and may have regard to comparable foreign case law.

(2) No law which limits any of the rights entrenched in this Chapter, shall be constitutionally invalid solely by reason of the fact that the wording used prima facie exceeds the limits imposed in this Chapter, provided such a law is reasonably capable of a more restricted interpretation which does not exceed such limits, in which event such law shall be construed as having a meaning in accordance with the said more restricted interpretation.

(3) In the interpretation of any law and the application and development of the common law and customary law, a court shall have due regard to the spirit, purport and objects of this Chapter.

⁴¹¹ De Ville *Constitutional and Statutory Interpretation* 1- 94.

⁴¹² De Ville *Constitutional and Statutory Interpretation* 1- 94.

⁴¹³ Section 166 states that:

'...The courts are—

(a) the Constitutional Court;

(b) the Supreme Court of Appeal;

(c) the High Court of South Africa, and any high court of appeal that may be established by an Act of Parliament to hear appeals from any court of a status similar to the High Court of South Africa;

(d) the Magistrates' Courts; and

(e) any other court established or recognised in terms of an Act of Parliament, including any court of a status similar to either the High Court of South Africa or the Magistrates' Courts'.

⁴¹⁴ As provided for in 167 of the Constitution.

⁴¹⁵ Section 168 of the Constitution.

⁴¹⁶ Section 169 of the Constitution.

⁴¹⁷ Section 166 of the Constitution.

Section 167 sets out the jurisdiction of the Constitutional Court and determines what constitutes a *quorum* in this court.⁴¹⁸ Section 168 determines the jurisdiction of the Supreme Court of Appeal and its *quorum*.⁴¹⁹

Section 169 determines the jurisdiction of the court and confirms the common law principle that this court has an inherent jurisdiction. It confirms the number of judges who constitute a majority to make a final decision.⁴²⁰ Sections 170⁴²¹ and 173⁴²² demonstrate the existence and powers of other courts created for litigation.⁴²³

Section 173 of the Constitution was considered in *South African Broadcasting Corporation Limited v National Director of Public Prosecution and others*⁴²⁴ where the court had to decide whether an application for leave to appeal against the decision of the Supreme of Court, could be granted or not.⁴²⁵

The media in this case sought permission to televise court proceedings relating to Shabir Shaik.⁴²⁶ He was convicted of corruption for payments he made to the then President, Mr Zuma, which were regarded as bribes.⁴²⁷

The Supreme Court of Appeal considered Shaik's right to privacy and balanced this right with the media's right to freedom of expression.⁴²⁸

⁴¹⁸ Section 167 of the Constitution.

⁴¹⁹ Section 168 of the Constitution.

⁴²⁰ Section 169 of the Constitution.

⁴²¹ Section 170 states: '...All courts other than those referred to in sections 167, 168 and 169 may decide any matter determined by an Act of Parliament, but a court of a status lower than the High Court of South Africa may not enquire into or rule on the constitutionality of any legislation or any conduct of the President'.

⁴²² Section 173 states: '... The Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa each has the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice'.

⁴²³ Section 173 of the Constitution.

⁴²⁴ *South African Broadcasting Corporation Limited v National Director of Public Prosecution and Others* Case CCT 58/06 paragraph 35.

⁴²⁵ *South African Broadcasting Corporation Limited v National Director of Public Prosecution and Others* Case CCT 58/06 paragraph 7-10.

⁴²⁶ *South African Broadcasting Corporation Limited v National Director of Public Prosecution and Others* Case CCT 58/06 paragraph 7-10.

⁴²⁷ *South African Broadcasting Corporation Limited v National Director of Public Prosecution and Others* Case CCT 58/06 paragraph 3.

⁴²⁸ *South African Broadcasting Corporation Limited v National Director of Public Prosecution and Others* Case CCT 58/06 paragraph 9 - 13.

The Supreme Court of Appeal found that Shaik's right to privacy was more important than the media's rights to freedom of expression.⁴²⁹ Therefore, the Supreme Court of Appeal refused to allow the media to televise the proceedings.⁴³⁰ This case is relevant to the enforcement of rules of the court discussed in chapter 3.

Statutory interpretation is significant because it shows that the legislature intended to make the provisions mandatory. The advancement of e-technology necessitates amendment to mandatory statutory provisions to the extent that these are abreast with e-technology and digital means of communication. Case law shows that currently the use of television in civil courts is not automatic; parties must apply and ask the court to grant permission to televise civil proceedings. This evidently needs to be reviewed to facilitate the use of e-technology or digital e-technology without necessarily asking for permission from the court. However, as much as there is a need to comply with e-technology, it is prudent to note that privacy rights must be respected.

6. Protection of the right to privacy

Section 14 of the Constitution enforces protection of the right to privacy and applies in terms of the law of civil procedure.⁴³¹ Section 14 states:

- ... Everyone has the right to privacy, which includes the right not to have—
- (a) their person or home searched;
 - (b) their property searched;
 - (c) their possessions seized; or
 - (d) the privacy of their communications infringed.

Interpretation implies that civil processes must be conducted in a manner that protects the plaintiff and defendant's right to privacy. For, example, when the sheriffs effect service, the defendant's rights to privacy ought to be enforced - meaning that the defendant should not be embarrassed in front of other people when attaching property, for example.

⁴²⁹ *South African Broadcasting Corporation Limited v National Director of Public Prosecution and Others* Case CCT 58/06 paragraph 9 - 13.

⁴³⁰ *South African Broadcasting Corporation Limited v National Director of Public Prosecution and Others* Case CCT 58/06 para 35.

⁴³¹ Section 14 of the Constitution.

Van der Merwe puts emphasis on the need to protect data to prevent infringement of privacy and sets out examples of how this can be achieved.⁴³² For example, there must be strict measures in place to regulate the internet and there must be compliance with international standards.⁴³³ Currie and de Waal illustrate the importance of protecting the right to privacy when complying with laws and conduct that hinder protection of the right to privacy.⁴³⁴

In *NM v Smith*⁴³⁵ the Constitutional Court affirmed that the publication of the HIV status of three women who took part in an HIV study, and who did not give consent to such publication, infringed on their rights to privacy, entrenched in the Constitution.⁴³⁶ In coming to its conclusion, the Constitutional Court referred to the case of *Bernstein v Bester*.⁴³⁷

In *Minister of Police v Kunjana*⁴³⁸ the Constitutional Court had to consider infringement of the right to privacy where two searches were conducted without a warrant.⁴³⁹ There were allegations made that there were illegal drugs kept in the premises of the Respondent.⁴⁴⁰ The Respondent took the matter to the Constitutional Court after these two searches were conducted.⁴⁴¹

The court considered the decision of the Constitutional Court in cases such the *Bernstein and Mistry* mentioned above, and affirmed the protection of the right to privacy in search warrant cases.⁴⁴² The protection of the right to privacy is important in computer-generated evidence when parties must discover evidence and is similar to the case of *Mistry v Interim National Medical and Dental Council and Others*.⁴⁴³ In this case, a search was conducted on the premises of a doctor.⁴⁴⁴

⁴³² Van der Merwe 2014 *PER* 306.

⁴³³ Van der Merwe 2014 *PER* 306.

⁴³⁴ Currie and de Waal *The Bill of Rights Handbook* 294.

⁴³⁵ Case CCTV 69/05 2007 ZACC 6 para 32 -47.

⁴³⁶ *NM v Smith* Case CCTV 69/05 2007 ZACC 6 para 32 -47.

⁴³⁷ *Bernstein v Bester NO and Others* 1996 (2) SA 751 (CC).

⁴³⁸ *Minister of Police v Kunjana* 2016 SACR 473 (CC).

⁴³⁹ *Minister of Police v Kunjana* 2016 SACR 473 (CC) para 1.

⁴⁴⁰ *Minister of Police v Kunjana* 2016 SACR 473 (CC) para 2.

⁴⁴¹ *Minister of Police v Kunjana* 2016 SACR 473 (CC) para 6.

⁴⁴² *Minister of Police v Kunjana* 2016 SACR 473 (CC) para 15 - 28.

⁴⁴³ *Mistry v Interim National Medical and Dental Council and Others* Case CCT 13/97.

⁴⁴⁴ *Mistry v Interim National Medical and Dental Council and Others* Case CCT 13/97 para 10.

The doctor was not in his medical rooms at the time the search was conducted and there were some items seized.⁴⁴⁵ The doctor lodged a claim for infringement of his right to privacy.⁴⁴⁶ The Constitutional Court held that the doctor's rights had indeed been infringed by the search conducted whilst he was not in his medical rooms.⁴⁴⁷

Considering the Constitutional Court cases discussed *supra*, it is evident that the court takes high regard in protecting the right to privacy. It is therefore argued that extreme measures must be taken to ensure that the right to privacy is protected when complying with ECTA provisions over and above those set out in the POPI Act.

Further, Van der Merwe recognises the admissibility of evidence generated by e-technology and puts emphasis on the significance of ensuring that such data software has measures in place that protect it.⁴⁴⁸ This protection was also acknowledged and enforced in *CMC Woodworking Machinery v Odendaal Kitchens*,⁴⁴⁹ where the court affirmed that service could be affected by substituted service through Facebook, other means of social media, including publication of such notice in a newspaper.⁴⁵⁰

The High Court recognised that technology changes rapidly and gone are the days when service was only affected by telefax; and acknowledged that there are developments insofar as e-technology from 1947 up until the time the judgment was delivered.⁴⁵¹ This court affirmed that courts should be flexible when there are issues relating to e-technology law.⁴⁵²

⁴⁴⁵ *Mistry v Interim National Medical and Dental Council and Others* Case CCT 13/97 para 10.

⁴⁴⁶ *Mistry v Interim National Medical and Dental Council and Others* Case CCT 13/97 para 10.

⁴⁴⁷ *Mistry v Interim National Medical and Dental Council and Others* Case CCT 13/97 para 30.

⁴⁴⁸ Van der Merwe 2014 *PER* 306.

⁴⁴⁹ *CMC Woodworking Machinery v Odendaal Kitchens* Case no 6846/2006 KZN.

⁴⁵⁰ *CMC Woodworking Machinery v Odendaal Kitchens* para 9 -13.

⁴⁵¹ *CMC Woodworking Machinery v Odendaal Kitchens* para 1-9.

⁴⁵² *CMC Woodworking Machinery v Odendaal Kitchens* para 1-13.

7. Protection of Personal Information Act 4 of 2013⁴⁵³

The POPI Act was introduced to enforce section 14 of the Constitution and to put strict measures in place that further protect the right to privacy.⁴⁵⁴ The POPI Act regulates the process, processing, and collection of personal information.⁴⁵⁵

There are three key elements of POPI, namely it regulates and sets out conditions upon which a person's information may be collected, processed and disclosed.⁴⁵⁶ For example, there must be consent to process information.⁴⁵⁷ Further, law must require the collection.⁴⁵⁸ Section 9 provides that information ought to be processed in a manner that does not hinder the right to privacy and promotes confidentiality.⁴⁵⁹

Section 11(4) states:

"...If data subject has objected to the processing of personal information in terms of subsection 3, the responsible party may no longer process the personal information."⁴⁶⁰

⁴⁵³ Hereinafter referred to as the POPI Act.

⁴⁵⁴ Section 2 (a) of the POPI Act.

⁴⁵⁵ Sections 9 and 13 of POPI Act.

⁴⁵⁶ The preamble and sections 4; 12; 13 of POPI.

⁴⁵⁷ Section 11 of POPI

⁴⁵⁸ Section 13(1) of POPI.

⁴⁵⁹ Section 9(1) of POPI.

⁴⁶⁰ Section 11 states:

'... (1) Personal information may only be processed if—

(a) the data subject or a competent person where the data subject is a child consents to the processing;

(b) processing is necessary to carry out actions for the conclusion or performance of a contract to which the data subject is party;

(c) processing complies with an obligation imposed by law on the responsible party;

(d) processing protects a legitimate interest of the data subject;

(e) processing is necessary for the proper performance of a public law duty by a public body; or

(f) processing is necessary for pursuing the legitimate interests of the responsible party or of a third party to whom the information is supplied.

(2) (a) The responsible party bears the burden of proof for the data subject's or competent person's consent as referred to in subsection (1)(a).

(b) The data subject or competent person may withdraw his, her or its consent, as referred to in subsection (1)(a), at any time: Provided that the lawfulness of the processing of personal information before such withdrawal or the processing of personal information in terms of subsection (1)(b) to (f) will not be affected.

(3) A data subject may object, at any time, to the processing of personal information—

(a) in terms of subsection (1)(d) to (f), in the prescribed manner, on reasonable grounds relating to his, her or its particular situation, unless legislation provides for such processing; or

(b) for purposes of direct marketing other than direct marketing by means of unsolicited electronic communications as referred to in section 69.

(4) If a data subject has objected to the processing of personal information in terms of subsection (3), the responsible party may no longer process the personal information'.

This provision is important in law of civil procedure, particularly where there is a need to discover personal information in terms of the rules, which forms part of the cause of action. If the plaintiff for example, objects to the processing of personal information relating to the cause of action, such information may not be disclosed. In such situations, the defendant will have difficulty raising a defence in such a matter, which he/she is entitled to do.

There is a need to amend this provision to ensure that civil processes are properly conformed to and parties are at liberty to use information to properly plead or raise a defence. A proposed draft of the amendment will be provided in chapter 5.

Section 13 sets out a requirement that a person, whose information ought to be gathered, must be made aware of such.⁴⁶¹ Section 14 of POPI must be read with section 51 of the ECTA because they both illustrate the way information may be restricted as discussed above. Section 26 is equally important because it sets out restrictions to the processing of exclusive information.⁴⁶²

There is an obligation on those who process, collect, and store client data to keep that data secret.⁴⁶³ The client-privilege principle is enforced and protected in section 86 of POPI.⁴⁶⁴

⁴⁶¹ Section 13 (2) of the POPI Act.

⁴⁶² Section 26 states that:

‘...A responsible party may, subject to section 27, not process personal information

Concerning -

(a) the religious or philosophical beliefs, race or ethnic origin, trade union membership, political persuasion, health or sex life or biometric information of a data subject; or

(b) the criminal behaviour of a data subject to the extent that such information relates to -

(i) the alleged commission by a data subject of any offence; or

(ii) any proceedings in respect of any offence allegedly committed by a data subject or the disposal of such proceedings’.

⁴⁶³ Section 54 states that: ‘...A person acting on behalf or under the direction of the Regulator, must, both during or after his or her term of office or employment, treat as confidential the personal information which comes to his or her knowledge in the course of the performance of his or her official duties, except if the communication of such information is required by law or in the proper performance of his or her duties’.

⁴⁶⁴ Section 86 states that:

‘... (1) Subject to the provisions of this section, the powers of search and seizure conferred by a warrant issued under section 82 must not be exercised in respect of -

(a) any communication between a professional legal adviser and his or her client in connection with the giving of legal advice to the client with respect to his or her obligations, liabilities or rights; or

Section 81 and 104 of POPI are similar to subpoena *duces tecum* discussed earlier in this chapter, in that a person may be called to produce evidence during an investigation conducted by the Regulator in terms of the POPI Act.⁴⁶⁵ If such a person does not conform to the requirement of producing the evidence, it will be regarded as an offence.⁴⁶⁶ Anyone who is aggrieved by the non-compliance with the Act has legal recourse to institute civil proceedings.⁴⁶⁷

The reason POPI is referred to in this research is that practitioners or legal representatives share information via e-mail, SMSs, and other means of e-technology. Considering this, there is a need to ensure that current rules are amended to effect compliance with POPI. The proposed draft rules will incorporate the relevant aspects that enforce the privacy of the client.

It must be borne in mind that protection of privacy is subject to the limitation clause in section 36 of the Bill of Rights.⁴⁶⁸ When the courts determine issues relating to the Bill of Rights, conflicting rights will be weighed against each other by applying the limitation clause to determine the right that outweighs the other.⁴⁶⁹

(b) any communication between a professional legal adviser and his or her client, or between such an adviser or his or her client and any other person, made in connection with or in contemplation of proceedings under or arising out of this Act, including proceedings before a court, and for the purposes of such proceedings’.

⁴⁶⁵ Section 81(a) of the POPI Act.

⁴⁶⁶ Section 104(2) of the POPI Act.

⁴⁶⁷ Section 99 of the POPI Act.

⁴⁶⁸ Section 36 states that:

‘... (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights’.

⁴⁶⁹ As per *S v Makwanyane* 1995 3 SA 391 (CC);^{32 -47}; *Bernstein v Bester* NNO and Others 1996SA 751 (CC); *Minister of Police v Kunjana* 2016 SACR 473 (CC); *NM v Smith* Case CCTV69/05 2007 ZACC 6.

Preliminary conclusion

It is clear that e-technology and South African e-technology law have evolved significantly over time. Thus, there is improvement in the recognition and protection of the right to privacy in the application of e-technology law. For example, the POPI Act and ECTA attempt to address protection needed in the law of civil procedure although it needs to be enhanced to ensure proper alignment with section 14 of the Constitution, POPI, ECTA as well as RICA.

The reality is that that e-technology evolves on a regular basis and measures need to be taken to ensure that South African law of civil procedure is abreast with developments. From a civil procedure law perspective, it is evident that there is a need to amend current court processes in conformity with e-technology law. This has been demonstrated by antiquated methods currently in use in effecting service of summons, for example.

We are confronted with the reality that the future existence of sheriffs in civil courts will be abrogated by disuse once the changes brought about by e-technology law are properly implemented as per ECTA. As illustrated above it has made provision for the digitalization of many processes. It is evident that soon, all the processes will be conducted by electronic communication, including the filing of court documents.

This will necessitate the installation of satellite dishes by government departments in both rural and urban areas, particularly in courts where the proposed digital centralised department will operate. This will efficiently facilitate the processes of law of civil procedure and will ensure compliance with the ECTA and other e-technology law. Digital e-technology should be designed in a manner that enables any party to access information relating to civil proceeding and track progress made in individual cases. The system should also have pop-up messages to indicate due dates for different court processes. For example, after the plaintiff files a notice of motion, the defendant has 10 days to file notice to defend the matter. It would be very useful to have pop-up messages as a reminder of subsequent processes followed in terms of the rules.

The South African judiciary and legislature must ensure adequate budget to successfully implement e-technology law.

This will be ensured by having professional and accredited service providers, and data controllers, to deal with court files, avoid breach of confidentiality and facilitate efficient and effective court proceedings.

Case law⁴⁷⁰ demonstrates a trend of admitting computer generated evidence because courts now acknowledge and admit evidence in data format as described by the ECTA and other e-technology law. Given the discussion in this chapter, there is a need to amend the current law of civil procedure to ensure its alignment with e-technology and ECT laws as demonstrated in chapter 5.

Chapter 3 will demonstrate similar trends as far as lack of implementation of the ETCA in the rules of court, which enforce the legislative provisions discussed in this chapter.

⁴⁷⁰ *Mdlongwa v S* 2010 (99/10) ZASCA 82; *Spring Forest Trading v Wilberry Pty Ltd* 725 13SCA; *Ndlovu v Minister of Correctional services & another* 2006 JOL 17037 (W); *CMC Woodworking Machinery v Odendaal Kitchens* Case no 6846/2006 KZN; *S v Ndiki* 2007 2 All SA 185 Ck; *Ketler Investment v Internet Service Provider Association* 2014 ALL SA 566 GSJ.

CHAPTER THREE- SOUTH AFRICAN CIVIL PROCEDURE RULES AND E-TECHNOLOGY

Chapter preface

Chapter 3 provides an analysis, interpretation, and application overview of the rules of court applicable in South African civil proceedings, adjunct to legislation discussed in chapter 2. The analysis will illustrate breaches in the implementation of the ECTA, determine the extent thereof, and consider possible solutions to cure the identified lacunae. The aim of the chapter is to review the current rules regulating the law of civil procedure and provide a solution to the gaps identified to ensure that South African civil procedure is abreast with developments in e-technology law.

1. Introduction

The Rules Board for Courts of Law Act 107 of 1985 aims to ensure that South African court officials regulate process and efficiently manage courts.¹ The Act confers the Rules Board with powers to make rules for the respective courts.² The Rules Board is likewise responsible for reviewing current rules to ensure compliance with legislation such as the ECTA and e-technology law.³ There are rules for respective courts of South Africa.⁴ According to Harms, the rules are binding and must be complied to.⁵

Rules regulate proceedings in the Constitutional Court,⁶ seem advanced in embracing e-technology compared to other rules of courts. For example, they enable parties to use electronic communication when filing court documents.⁷

¹ The preamble of the Rules for Courts of Law Act 107 of 1985 [Hereinafter referred to as the Rules for Courts of Laws Act].

² The preamble of the Rules for Courts of Law Act.

³ The preamble and section 6 of the Rules for Courts of Law Act.

⁴ Section 6 of the Rules of the Rules for Courts of Law Act.

⁵ Harms D *Civil Procedure in Magistrates' Courts* Part C (LexisNexis Durban 2016) C-10 –100.

⁶ Constitutional Court Rules.

⁷ Rule 4 of the Constitutional Court Rules.

Likewise, rules ensure efficient functioning of the Supreme Court of Appeal.⁸ It is submitted that this set of rules require analysis which insofar as implementing e-technology law. The Uniform Rules of Court, which regulate the superior courts, require scrutiny and development to ensure that they are au courant with the advancing e-technology law.⁹ In addition, Magistrates' Courts Rules require amendment insofar as implementation of e-technology law is concerned.¹⁰

Small Claims Courts Rules are different from the other rules concerning the way the proceedings are conducted, for example, there are no judges in this court.¹¹ The current Rules of the Small Claims Court do not competently support the implementation of the ECTA and require amendment.¹²

Rules regulating South Africa courts structures and proceeding, as they relate to civil procedure, and their lack of congruence with the ECTA and e-technology legislation are discussed below.

2. Constitutional Court Rules No R1675 of 2003

Before discussing Constitutional Court Rules, it is practical to discuss attempts to embrace e-technology in the Constitutional Court.¹³ For instance, the Constitutional Court website gives a summary of the court roll.¹⁴ The site also contains information pertaining to the rules of court.¹⁵ Furthermore, it contains details of court officials and judgments delivered by the court.¹⁶

The website gives details of judges and other relevant information important to the operation of the Constitutional Court.¹⁷

⁸ Rules Regulating the conduct of the proceedings of the supreme court of appeal of [R1523 November 1998].

⁹ Uniform Rules of Court of 2009.

¹⁰ Magistrates' Courts' Rules.

¹¹ Small Claims Court Rules.

¹² Small Claims Court Rules.

¹³ <http://www.constitutionalcourt.org.za/site/home.htm> (Date of use: 18 January 2018).

¹⁴ <http://www.constitutionalcourt.org.za/site/home.htm> (Date of use: 18 January 2018).

¹⁵ <http://www.constitutionalcourt.org.za/site/home.htm> (Date of use: 18 January 2018).

¹⁶ <http://www.constitutionalcourt.org.za/site/home.htm> (Date of use: 18 January 2018).

¹⁷ <http://www.constitutionalcourt.org.za/site/home.htm> (Date of use: 18 January 2018).

It is submitted that the website requires modification to enhance the use of e-technology but that it is at least an attempt to embrace online communication. Online communication, which is information orientated, does not go to the heart of court process and rules.

The Constitutional Court is the apex court as previously indicated in chapter 2.¹⁸ Civil proceedings operate in accordance with the rules of the Constitutional Court.¹⁹ Certain rules are identified as misaligned with the ECTA provisions and other e-technology, relating especially to the manner in which proceedings are brought before court.²⁰

For example, it is common cause that the Constitutional Court deals with appeals from lower courts and therefore proceedings commence by notice.²¹ Rule 4 notices, directions, and communication acknowledge the use of e-technology.²² Electronic copies of court documents may, for example, be submitted using e-technology.²³ Constitutional Court Rule 1(4) states:

“Notices, directions or other communication in terms of these rules may be given or made by registered post or facsimile or other electronic copy; Provided if a notice or other communication is given by electronic copy, the party giving such notice or communication shall forthwith lodge with the registrar a hard copy of the notice or communication, with a certificate signed by such a party verifying the date of such communication or notice.”²⁴

Analysis of this Rule proves that the drafters intended to implement the ECTA. The Rule is however qualified by the proviso that hard-copies must be filed after parties have submitted electronically. While prima facie the use of electronic means is allowed, the requirement of hard-copy filing tautologises the process.

Du Plessis *et al* confirm that one of the few duties of the Registrar regard is to number and file court papers.²⁵

¹⁸ The Constitution Seventeenth Amendment Act of 2012.

¹⁹ Constitutional Court Rules No R1675 OF 2003 [Herein after referred to as the Constitutional Court Rules].

²⁰ Rule 1(4) of the Constitutional Court Rules.

²¹ Constitutional Court Rules.

²² Rule 1(4) of the Constitutional Court Rules.

²³ Rule 1(4) of the Constitutional Court Rules.

²⁴ Rule 1(4) of the Constitutional Court Rules.

²⁵ Du Plessis *et al Constitutional Litigation* 165.

Scholars acknowledge that the Registrar is approachable when one of the parties is unfamiliar with court process and can seek guidance in this regard.²⁶ Further, parties in the Constitutional Court can easily communicate with the Registrar via phone or e-mail.²⁷ It appears that scholars acknowledge the need to embrace electronic communication with court officials but, it is submitted, this is insufficient. It is argued that South African court processes must be in-line with international standards and e-technology law as is the case in England.²⁸

According to Rule 10, the Registrar is obliged to keep court records.²⁹ In terms of Rule 10 the Registrar cannot allow parties to remove court documents.³⁰ The Rule, however, does not indicate whether the Registrar should keep electronic archives of submitted documents. Therefore, it is suggested, hard-copies should be scanned and converted to PDF format and thereafter archived instead of keeping hard-copies only. Advancing technology means that, in future, everything will be digitized, and printing of documents and hard-copies will become obsolete. Thus, South African court procedure must begin embracing e-technology in all respects but particularly in her apex court, which dictates direction to lower courts.

Rule 18 provides that application to Court for direct access is lodged with the Registrar. The Rule requires parties to sign the application. The Rules however do not indicate whether electronic signature is accepted. Papadopoulos and Snail ³¹ profess that in practice documents are in writing and therefore logically must be signed.³² Therefore, it is argued that electronic signature on applications should be accepted. This is, however, not currently the case within the confines of the Rule. Rule 4 refers only to electronic copies but there is no reference to the use of advanced electronic communication as provided in section 1 and 13 of the ECTA. There is a need for the rules to support the use of advanced electronic signature to ensure compliance with the ECTA and international standards.

²⁶ Du Plessis *et al Constitutional Litigation* 165.

²⁷ Du Plessis *et al Constitutional Litigation* 165.

²⁸ South African courts should follow a similar trend as England did in the Practice Direction 510 – Electronic working Pilot Scheme; which implements e-technology international standards as well as e-technology law.

²⁹ Rule 10(a) of the Constitutional Court Rules.

³⁰ Rule 10(a) of the Constitutional Court Rules

³¹ Papadopoulos and Snail *The law of the internet in South Africa* 320.

³² Papadopoulos and Snail *The law of the internet in South Africa* 320.

Rule 20 refers to the pagination process, which is a long-standing rule in practice.³³ This requires literal manual numbering of pages, which is not in-line with advancing e-technology. There is a need to develop this practice to align with e-technology. Rule 20 is mandatory judging from the use of the word *shall* in its text.³⁴ This calls for a review of the pagination process described in Rule 20. In the researcher's view, if documents are electronically submitted and numbered correctly, it satisfies the requirements of order whether manual or electronic. In the alternative the index should be drafted in a manner that incorporates all pages of the documents; and should be scanned and saved as PDF in an archive file where court papers are saved. The scanned document, with the correct numbering, should suffice, as opposed to expecting parties to send a candidate attorney to paginate the court file. This will save the courts' time as well the respective parties. The same applies to the requirement that the bulky records should be bound.³⁵

Further, copies of the record require separation into sizes per volume.³⁶ Interpretation of this Rule demonstrates that the requirement is compulsory.³⁷ This can be circumvented using e-technology instruments or facilities. For example, one file could be created, and all documents could be archived there. This will save time for the court and respective parties. It appears that there was good reason for drafting the requirement relating to bulky records.³⁸ However, times have changed, and South African courts must embrace e-technology when implementing rules of civil procedure. In the future everything will be digitalized, courts proceedings included.

³³ Rule 20 of the Constitutional Court Rules. Obvious purpose means that pagination is a method that used to ensure the court's papers that are contained in the file. This enables the court to easily find the information when needed during the proceedings.

³⁴ Rule 20(2)(d) state: 'The pages shall be numbered clearly and consecutively and every tenth line on each page shall be numbered and pagination used in the court of first instance shall be retained where possible'.

³⁵ Rule 20(2) (e) of the Constitutional Court Rules.

³⁶ Rule 20(2) (e) of the Constitutional Court Rules.

³⁷ Rule 20(2) (e) of the Constitutional Court Rules states: 'Bulky records shall be divided into separate conveniently sized volumes of approximately 100 pages each. The record shall be securely bound in book format to withstand constant use and shall be so bound that upon being used will lie open without manual or other restraints'.

³⁸ Rule 20(2) (e) of the Constitutional Court Rules.

Rule 20 further requires documents to be secured in covers.³⁹ The cover must show particulars of the parties to the case, for example, the names of the parties.⁴⁰ Once again, this Rule uses the word *shall* illustrating that it is compulsory. The same Rule further sets out an additional requirement that the volume numbers should appear on the spine of the document.⁴¹ The Sub-Rule uses the word *shall* and this confirms that this rule is mandatory.⁴²

To a certain extent Rule 20 recognises the use of e-technology in Constitutional Court proceedings.⁴³ Interpretation of the Rule however requires duplication of work. Duplication refers to the process of making hard-copy documents after filing or serving electronically. If the Registrar archives documents, there should be no further obligation on the parties to supply hard-copies. Therefore, it is sufficient to file electronic copies via electronic communication through the Registrar, who in return should keep all documents electronically in an archive file.⁴⁴ The current Rule only enables the Registrar to copy the file from disk.⁴⁵ This disk is returned to the supplying party.⁴⁶ Duplication is a waste of financial and human resources that could be used for other projects.

³⁹ Rule 20(2)(f) of the Constitutional Court Rules.

⁴⁰ Rule 20(2)(f) state: 'All records shall be securely bound in suitable covers disclosing, names, of the parties, the volume number and the number of the pages contained in that volume, the total number of volumes, court *a qua* and the names of attorneys of the parties'.

⁴¹ Rule 20(2)(g) of the Constitutional Rules of Court. This rule states: '...The binding required by this rule shall be sufficiently to secure the stability of the papers contained within the volume; and where the record consists of more than one volume, the number of pages contained in the volume shall appear on the upper third of the spine of the volume...'

⁴² Rule 20(2)(g) of the Constitutional Rules of Court.

⁴³ Rule 20(2)(h) of the Constitutional Rules of Court. This rule states: '...Where documents are lodged with the Registrar and such documents are recorded on a computer disk, the party lodging the document shall where possible also make available to the registrar a disk containing the file in which the document is contained, or transmit an electronic copy of the document concerned by e - mail in a format determined by the Registrar which is compatible with software that is used by the Court at the same time of lodgement, to the Registrar at: registrar@concourt.org.za: Provided that the transmission of such copy shall not relieve the party concerned from the obligation under rule 1(3) to lodge the prescribed number of the hard-copies of the documents so lodged...'

⁴⁴ Rule 20(2)(h) of the Constitutional Rules of Court.

⁴⁵ Rule 20(2)(i) of the Constitutional Rules of Court.

⁴⁶ Rule 20(2)(i) of the Constitutional Rules of Court. Although this rule obliges parties to submit 13 hard-copies, it observed that the latter does not provide reasons why these copies should be provided.

There is an obligation on the party to lodge 13 copies of documents.⁴⁷ It is submitted that hard-copy duplication is excessive⁴⁸ and could be prevented by resorting to an electronic system that enables the court to file,⁴⁹ store, and archive documents without concern over the volume of documents. It is argued that a party should be given a choice to file or lodge via electronic communication, for those who have access to e-technology, or to file manually for those who do not, particularly in rural areas. The added requirement to lodge 13 copies after filing electronically, is a waste of court officials' and the legal representatives' time, which view is supported by scholars.⁵⁰ It is submitted that this Rule should be amended to embrace e-technology and pave the way for the use of digital technology in future. The researcher submits that legislative drafters should move away from paper-based communication towards digital communication technology.

Du Plessis *et al* observe that proceedings in the Constitutional Court are open to the public.⁵¹ Scholars confirm that Constitutional Court proceedings do to a certain extent use e-technology.⁵² For example, the proceedings may be televised, provided that cameras do not move around the courtroom.⁵³ This research does not venture into the field of open justice.

Rule 22 supports taxation of party-on-party costs by the Taxing Master. The attorney for the successful party must comply with this Rule.⁵⁴ It is common cause that the taxation process requires attorneys to physically attend the office of the Registrar, and work together with the Taxing Master, regarding taxation of the bill of costs. As important as this Rule may appear, it is time that the way the process is conducted is reviewed.

⁴⁷ Rule 20(2)(i) of the Constitutional Rules of Court.

⁴⁸ Papadopoulos S and Snail S Cyberlaw @SAIII: *The law of Internet in South Africa* 3rd ed. (Van Schaik Pretoria 2012) 316 - 332.

⁴⁹ Papadopoulos and Snail *The law of Internet in South Africa* 316 – 332.

⁵⁰ Papadopoulos and Snail *The law of Internet in South Africa* 316.

⁵¹ Du Plessis *et al Constitutional Litigation* 166 – 167.

⁵² Du Plessis *et al Constitutional Litigation* 166.

⁵³ Du Plessis *et al Constitutional Litigation* 166.

⁵⁴ Rule 22 of the Constitutional Rules of Court.

For example, there is no need to physically attend; attorneys and Registrar could manage this process through exchange of documents and finalise matters through e-technology. Du Plessis *et al* discuss the case of *Hennie de Beer Game Lodge CC v Waterbok Bosveld Plass CC and Another*.⁵⁵

In this case, the Constitutional Court was asked to review a bill of costs presented to the Taxing Master for an amount of R 129 504 subject to a discount.⁵⁶ This case sets out principles to be followed⁵⁷ when parties review the decision of the Taxing Master.⁵⁸ It was argued the Taxing Master should not have allowed a fee for 61 hours for drafting a 62 pages affidavit.⁵⁹ The nub of the issue that led to the dispute was that the Applicant wanted to erect a camp in a private nature reserve.⁶⁰ The Respondent applied for an interdict which was dismissed by the court a quo.⁶¹ The Respondent appealed and the interdict was granted with party-on-party costs.⁶² The Respondent presented the bill of costs which allowed, including the 61 hours of drafting.⁶³ There was a 10% discount to the original amount, which the Taxing Master allowed.⁶⁴

⁵⁵ 2010 (5) SA 124 (CC) Du Plessis *et al* *Constitutional Litigation* 143.

⁵⁶ Du Plessis *et al* *Constitutional Litigation* 143; *Hennie de Beer Game Lodge CC v Waterbok Bosveld Plaas CC and Another* 201 (5) 124 (CC) para 2 - 6.

⁵⁷ Du Plessis *et al* *Constitutional Litigation* 143.

⁵⁸ Du Plessis *et al* *Constitutional Litigation* 143. The six principles that Du Plessis *et al* are referring to are:

‘...(i) Costs are awarded to a successful party to indemnify it for the expense to which it has been put through having unjustly compelled either to initiate or defend litigation;

(ii) A moderating balance must be struck, which affords the innocent party adequate indemnification, but within reasonable bounds;

(iii) The Taxing Master must strike this equitable balance correctly in the light of all the circumstances of the case;

(iv) An overall balance between the interest of the parties should be maintained;

(v) The Taxing Master should be guided by the general precept that fees allowed constitute reasonable remuneration for necessary work properly done

(vi) The court will not interfere with a ruling made by the Taxing Master merely because its view differs from hers, but only when it is satisfied that the Taxing Master’s view differs so materially from its own that it should be held to vitiate the ruling...’

⁵⁹ *Hennie de Beer Game Lodge CC v Waterbok Bosveld Plaas CC and Another* 201 (5) 124. (CC) para 1 - 6.

⁶⁰ *Hennie de Beer Game Lodge CC v Waterbok Bosveld Plaas CC and Another* 201 (5) 124. (CC) para 1 - 6.

⁶¹ *Hennie de Beer Game Lodge CC v Waterbok Bosveld Plaas CC and Another* 201 (5) 124. (CC) para 1 - 6.

⁶² *Hennie de Beer Game Lodge CC v Waterbok Bosveld Plaas CC and Another* 201 (5) 124. (CC) para 1 - 6.

⁶³ *Hennie de Beer Game Lodge CC v Waterbok Bosveld Plaas CC and Another* 201 (5) 124. (CC) para 2 - 6.

⁶⁴ *Hennie de Beer Game Lodge CC v Waterbok Bosveld Plaas CC and Another* 201 (5) 124. (CC) para 1 - 6.

In the Constitutional Court, it was argued that 61 hours for a 62 page affidavit was excessive.⁶⁵ Furthermore, it was submitted, that the hours were unreasonable.⁶⁶ The Constitutional Court held that courts must consider all circumstances when reviewing taxation.⁶⁷ In addition, the Court found that it will not readily interfere with decisions by the Taxing Master⁶⁸ unless there is an error in judgment as was the case in this instance.⁶⁹ Thus, the Taxing Master erred in allowing 61 hours for fees⁷⁰ and the Court reduced this to 20 hours.⁷¹ Accordingly, the decision of the Taxing Master was set aside.⁷²

Du Plessis *et al* are of the view that courts will not readily interfere with decisions by the Taxing Master.⁷³ The court will depart from such a decision when there is a material difference between the court's decision and that of the Master.⁷⁴ Du Plessis *et al*'s view demonstrates the significance of the taxation process in practice and the fact that legal practitioners work hard on matters.⁷⁵ Therefore, legal practitioners ought to be rewarded as such and this is achieved through taxation.⁷⁶ It is argued that the taxation process, in its current form, does not embrace the use digital or e-technology, because parties are required to appear physically in the office of the Registrar to present the bill of costs. Any dispute would require physical appearance, but simple taxation could be facilitated via electronic exchange of documents.

⁶⁵ *Hennie de Beer Game Lodge CC v Waterbok Bosveld Plaas CC and Another* 201 (5) 124. (CC) para 13 - 17.

⁶⁶ *Hennie de Beer Game Lodge CC v Waterbok Bosveld Plaas CC and Another* 201 (5) 124. (CC) para 13 -17.

⁶⁷ *Hennie de Beer Game Lodge CC v Waterbok Bosveld Plaas CC and Another* 201 (5) 124. (CC) para 13 -17.

⁶⁸ *Hennie de Beer Game Lodge CC v Waterbok Bosveld Plaas CC and Another* 201 (5) 124. (CC) para 13 -17.

⁶⁹ *Hennie de Beer Game Lodge CC v Waterbok Bosveld Plaas CC and Another* 201 (5) 124. (CC) para 13 -17.

⁷⁰ *Hennie de Beer Game Lodge CC v Waterbok Bosveld Plaas CC and Another* 201 (5) 124. (CC) para 13 -17.

⁷¹ *Hennie de Beer Game Lodge CC v Waterbok Bosveld Plaas CC and Another* 201 (5) 124. (CC) para 17.

⁷² *Hennie de Beer Game Lodge CC v Waterbok Bosveld Plaas CC and Another* 201 (5) 124. (CC) para 17.

⁷³ Du Plessis *et al Constitutional Litigation* 143.

⁷⁴ Du Plessis *et al Constitutional Litigation* 143.

⁷⁵ Du Plessis *et al Constitutional Litigation* 144.

⁷⁶ Du Plessis *et al Constitutional Litigation* 144.

It is evident that there is, to some extent, advancement in the rules of the Constitutional Rules of court⁷⁷ in that they allow parties to lodge an appeal electronically.⁷⁸ Additionally, the rules enable parties to keep documents on computer disk for presentation to the Registrar.⁷⁹ Electronic filing is however subject to an obligation, to thereafter file hard-copies.⁸⁰ The researcher submits that this procedure requires modification in-line with her argument to embrace e-technology within court process.

The Constitutional Court, to a certain extent, embraces e-technology as judgments are loaded on the website.⁸¹ Furthermore, the website contains certain court documents such as pleadings.⁸² Scholars further acknowledge the blog website of the Constitutional Court.⁸³ Du Plessis *et al* demonstrate that there is a move, albeit slow, towards embracing e-technology in the Constitutional Court but it is argued that this is insufficient when judged against, for example, England which already has a pilot in place that is totally embrative of digital and e-technology in civil process.

The researcher avers that, although there is recognition of e-technology the Rules need modification to implement the ECTA and other e-technology provisions.

3. Rules Regulating the conduct of proceedings of the Supreme Court of Appeal⁸⁴

There are minor indications of attempts, however modest, by the Supreme Court of Appeal to adopt the use of e-technology. For example, the Court has developed a website.⁸⁵ The website provides an overview of relevant information about the court, such as judgments delivered.⁸⁶ Further, an electronic copy of the Rules of Court are provided on the site⁸⁷ as well as information regarding the court roll.⁸⁸

⁷⁷ Rules 4; 11(b) and 20(2)(h) of the Constitutional Rules of Court.

⁷⁸ Rules 4; 11(b) and 20(2)(h) of the Constitutional Rules of Court.

⁷⁹ Rule 20(2)(h) of the Constitutional Rules of Court.

⁸⁰ Rules 4; 11(b) and 20(2)(h) of the Constitutional Rules of Court.

⁸¹ Du Plessis *et al Constitutional Litigation* 171.

⁸² Du Plessis *et al Constitutional Litigation* 171.

⁸³ Du Plessis *et al Constitutional Litigation* 171.

⁸⁴ R1523, 27 November 1998

⁸⁵ <http://www.supremecourtofappeal.org.za> (Date of use: 18 January 2018).

⁸⁶ <http://www.supremecourtofappeal.org.za> (Date of use: 18 January 2018).

⁸⁷ <http://www.supremecourtofappeal.org.za> (Date of use: 18 January 2018).

⁸⁸ <http://www.supremecourtofappeal.org.za> (Date of use: 18 January 2018). Court roll stipulates the cases and times of cases to be heard.

Furthermore, the website provides the details of court officials⁸⁹ who manage court processes.⁹⁰ It is submitted that this website requires adaption in-line with suggested amendments provided in the last chapter of this research. At this juncture it suffices to state that the website has short-comings and is insufficient in a similar manner to the Constitutional Court website discussed above.

Concerning the Supreme Court of Appeal, it is of importance to illustrate the processes of managing and running efficiently and effectively.⁹¹ It is important to start with the relevant definitions pertinent to this research.

The Rules define lodging of documents with the Registrar as:

“...lodging of documents with the registrar” means the lodging of documents with the registrar through an attorney practicing in Bloemfontein or, if a party is not represented by an attorney, by registered post or by that party personally, after prior service of copies of such document on any other party.”⁹²

Interpretation of the Rule confirms it does not cater for the use of e-technology; for instance, it makes provision for lodgement of documents with the Registrar through an attorney and makes no mention of alternative e-technology methods of lodging.

Although the above definition does not make specific reference to electronic e-technology, it can be argued that there is some level of acknowledgment and recognition in Rule 4 which permits electronic copies.⁹³ This acknowledgment is limited because the Rule requires filing of original hard-copy documents after electronic submission.

Rule 4 compels the Registrar to number the notice that commences proceedings manually.⁹⁴ The Rule is silent on electronic use in the process of numbering.⁹⁵

⁸⁹ <http://www.supremecourtofappeal.org.za> (Date of use: 18 January 2018).

⁹⁰ <http://www.supremecourtofappeal.org.za> (Date of use: 18 January 2018).

⁹¹ Rules Regulating the Conduct of the Proceedings of the Supreme Court of Appeal of South Africa [Hereinafter referred to as the Rules of the Supreme Court of Appeal].

⁹² Rule 1 of the Rules of Supreme Court of Appeal.

⁹³ Rule 4(1)(b) of the Rules of Supreme Court of Appeal. This rule states: ‘The Registrar may provisionally accept in lieu of the original documents tendered for lodging a copy (including a facsimile or electronic copy) thereof, but the original shall be filed within 10 days thereafter.’

⁹⁴ Rule 4(2)(a) of the Rules of Supreme Court of Appeal. This rule states: ‘A notice of appeal or the first application in an intended appeal shall be numbered by the registrar with a consecutive number for the year during which it is filed’.

⁹⁵ Rule 4(2)(b) of the Rules of Supreme Court of Appeal.

A deduction can be made that numbering should be manual. There is a need to give an express provision on electronic means for numbering applications. Rule 4(2)(c) requires the Registrar to file court papers in accordance with the numbering used for that particular matter.⁹⁶ Rule 4 places a further obligation on the Registrar to ensure that court records are not removed from court.⁹⁷

Rule 6 deals with volume of documents when parties bring an application before court.⁹⁸ In addition, Rule 6 sets out a prescription period for the lodging of an appeal.⁹⁹ The parties must lodge an appeal within a month after service is affected.¹⁰⁰ Interpretation of the entire Rule 6 demonstrates a gap insofar as recognition of electronic communication and e-technology or digital e-technology devices is concerned. The content of this Rule ought to be amended in-line with ECTA provisions. Rule 6 also provides that parties must paginate court documents, or at least keep the pagination of lower courts.¹⁰¹ This is subject to whether there are added documents included in the appeal, in which case, parties will be required to re-paginate the court file.¹⁰² The same argument is made here as presented earlier in regard to the same rule in the Constitutional Court.

Rule 8 requires parties to lodge 6 copies of court documents.¹⁰³ These must be delivered to the court *a quo*.¹⁰⁴ The Rule requires that documents are also delivered to the respondent.¹⁰⁵ The manner of delivery is not provided in the Rule. It is submitted that it would be beneficial to permit parties to affect delivery through e-technology or electronic communication. This will save money and time for respective parties and court officials.

⁹⁶ Rule 4(2) (c) of the Rules of the Supreme Court of Appeal.

⁹⁷ Rule 4(2)(d) of the Rules of the Supreme Court of Appeal. This rule states: 'The registrar shall maintain the courts' records and shall not permit any of them to be moved from the court building, except as authorised by the registrar'.

⁹⁸ Rule 6(1) of the Rules of the Supreme Court of Appeal. This rule states: 'In every matter where leave to appeal is by law required of the court, an application thereof shall be lodged in duplicate with the registrar within the time limits prescribed by that law'.

⁹⁹ Rule 6(3) of the Rules of the Supreme Court of Appeal.

¹⁰⁰ Rule 6(3) of the Rules of the Supreme Court of Appeal. Rule 6(3) states: 'Every affidavit in an answer to an application for leave to appeal shall be lodged in duplicate within one month after service of the application on the respondent'.

¹⁰¹ Rule 6(5) of the Rules of the Supreme Court of Appeal.

¹⁰² Rule 6(5) of the Rules of Supreme Court of Appeal.

¹⁰³ Rule 8(1) of the Rules of Supreme Court of Appeal.

¹⁰⁴ Rule 8(1) of the Rules of the Supreme Court of Appeal.

¹⁰⁵ Rule 8(1) of the Rules of Supreme Court of Appeal.

Moreover, Rule 8 requires a party intending to prosecute to notify the Registrar.¹⁰⁶ It is noted however that the Rule is silent as to the manner in which such notification should be affected. This calls for modification of this Rule to include electronic communication and other e-technology methods.

Rule 8 forces parties to ensure that the record is numbered and paginated.¹⁰⁷ This Rule requires the party to keep the pagination of the court of first instance.¹⁰⁸ If, however, this is not possible, the parties may have to re-paginate the record.¹⁰⁹ Interpretation of Rule 8 demonstrates that the requirement is mandatory and subject to the same argument presented in regard to Rule 6 above, and a similar rule presented earlier in the researcher's discussion of the Constitutional Court.

In addition, Rule 8 requires a hard-copy core bundle to be prepared.¹¹⁰ E-technology is advancing to the extent that presiding officers and legal representatives will in future use tablets and computers to page documents in court. It is therefore necessary to change this Rule to enable representatives to use e-technology devices during court proceedings.

Rule 13 deals with notification by parties concerning notice of set-down.¹¹¹ This provision does not cater for electronic means of notification. Therefore, it is submitted there is a need to amend the Rule in-line with advancing e-technology law.

In terms of Rule 17, a party who is awarded party-on-party costs must submit the bill of costs to the Registrar for taxation.¹¹²

¹⁰⁶ Rule 8(4) of the Rules of Supreme Court of Appeal.

¹⁰⁷ Rule 8(6) (c) of the Rules of the Supreme Court.

¹⁰⁸ Rule 8(6) (c) of the Rules of the Supreme Court of Appeal.

¹⁰⁹ Rule 8(6) (c) of the Rules of the Supreme Court of Appeal. This rule states: 'The pages shall be numbered clearly and consecutively, and every tenth line and each page shall be numbered and the pagination used in the court *a qua* shall be retained where possible'.

¹¹⁰ Rule 8(7)(a) of the Rules of the Supreme Court of Appeal. This rule states: 'A core bundle of documents shall be prepared if to do so is appropriate to the appeal'.

¹¹¹ Rule 13(2) of the Rules of Supreme Court of Appeal. This rule states: 'A registered letter forwarded to a party's last known address shall be deemed to be sufficient notice of the date of the hearing'.

¹¹² Rule 17(1) of the Rules of the Supreme Court of Appeal. The rule states: 'The costs incurred in any appeal or application shall be taxed by the registrar, who, when exercising this function shall be called taxing master but his or her taxation shall be subject to review of the court'.

As indicated under the discussion regarding a similar Constitutional Court rule, this process requires physical attendance at the office of the Registrar. The arguments illustrated in the discussion of the Constitutional Court rules apply *mero motu*. It is submitted that gone are the days of manual labour and all courts should embrace e-technology to effect court processes. Taxation should be conducted through e-technology and digital means of communication. For example, parties can use digital tele-conferences to effect taxation and in this way, parties will be able to see each other and go through the bill of costs using digital e-technology. Once again, any dispute arising may require physical attendance and hearing, but this should be the exception rather than the rule.

4. Uniform Rules of Court 2009

Rules regulate proceedings in the High Court.¹¹³ The rules ensure order in the manner that courts are managed.¹¹⁴ For example, the Rules set out the process when commencing proceedings.¹¹⁵ Furthermore, Rules allow parties obtain all information necessary for trial so that there are no surprises in court.¹¹⁶ Unlike the Supreme Court, the High Court can act as a court *a quo* or as a court of appeal.

Before discussing the Rules of the High Court, it is important to highlight the proceedings before trial ensues as this court acts as a court of first instance in matters beyond the jurisdiction of the regional magistrate court.

Depending on the type of claim there are two methods to bring the matter before court. Using summons proceedings, the plaintiff issues summons to start civil proceedings.¹¹⁷ In practice, the sheriff of the court serves summons.¹¹⁸ The defendant manually files notice of intention to defend¹¹⁹ the matter after receiving summons.¹²⁰

¹¹³ Uniform rules of Court of 2009.

¹¹⁴ Rule 17 of the Uniform Rules of Court.

¹¹⁵ Rule 17 of the Uniform Rules of Court.

¹¹⁶ Rule 35 of the Uniform Rules of Court.

¹¹⁷ Rule 17 of the Uniform Rules of Court and Pete *et al Civil Procedure* 705.

¹¹⁸ Rule 17 of the Uniform Rules of Court and Pete *et al Civil Procedure* 704.

¹¹⁹ Rule 19 of the Uniform Rules of Court.

¹²⁰ Pete *et al Civil Procedure* 700.

Thereafter the defendant files a plea¹²¹ wherein he/she admits or denies the facts in dispute and/or brings a counter claim.¹²² The plaintiff may reply to the plea when there are new facts introduced by the defendant.¹²³ This is referred to as replication.¹²⁴ After exchanging pleadings, pleadings are regarded as closed¹²⁵ and parties may discover documents or evidence relevant to the proceeding.¹²⁶ The parties may ask the court for a trial-date through a set-down notice.¹²⁷ Before trial,¹²⁸ parties must conduct a pre-trial conference¹²⁹ wherein the facts in disputes are narrowed and/or unnecessary evidence is limited.¹³⁰

The second method of commencing proceedings is via application proceeding through notice of motion.¹³¹ The application is supported by affidavits wherein the parties set out the cause of action.¹³² The parties are referred to as applicant and respondent as opposed to plaintiff and defendant.¹³³ The respondent files a notice to oppose¹³⁴ the matter and may set out his/her defence in an affidavit.¹³⁵ This type of proceedings is used in interdict applications and evidence is presented through affidavits.¹³⁶ Oral evidence may be heard,¹³⁷ as opposed to pleadings as is the case in summons proceedings.

It is important to define delivery in Rule 1 of the Uniform Rules of Court. The Rules define delivery as service of court papers and filing in respective courts.¹³⁸ Rule 4 provides the way service should be affected.¹³⁹

¹²¹ Rule 22 of the Uniform Rules of Court.

¹²² Rule 22(2) of the Uniform Rules of Court and Pete *et al Civil Procedure* 692 to 701.

¹²³ Rule 25 of the Uniform Rules of Court.

¹²⁴ Rule 25 of the Uniform Rules of Court and Pete *et al Civil Procedure* 703.

¹²⁵ Rule 29 of the Uniform Rules of Court and Pete *et al Civil Procedure* 690 and 693.

¹²⁶ Rule 35 of the Uniform Rules of Court and

¹²⁷ Rule 6(1) of the Uniform Rules of Court and Pete *et al Civil Procedure* 700.

¹²⁸ Rule 39 of the Uniform Rules of Court.

¹²⁹ Rule 37 of the Uniform Rules of Court and Pete *et al Civil Procedure* 701.

¹³⁰ Rule 37 of the Uniform Rules of Court and Pete *et al Civil Procedure* 701.

¹³¹ Rule 6(1) of the Uniform Rules of Court and Pete *et al Civil Procedure* 688 and 700.

¹³² Rule 6(1) of the Uniform Rules of Court and Pete *et al Civil Procedure* 688.

¹³³ Rule 6 of the Uniform Rules of Court and Pete *et al Civil Procedure* 688 to 703.

¹³⁴ Rule 6 of the Uniform Rules of Court and Pete *et al Civil Procedure* 688 and 700.

¹³⁵ Rule 6 of the Uniform Rules of Court and Pete *et al Civil Procedure* 688 and 705.

¹³⁶ Rule 6 of the Uniform Rules of Court and Pete *et al Civil Procedure* 688 to 700.

¹³⁷ Pete *et al Civil Procedure* 688 to 700.

¹³⁸ Rule 1 of the Uniform Rules of Court.

¹³⁹ Rule 4(1)(a) of the Uniform Rules of Court. This rule states:

Rule 4A recognises and implements, albeit to a limited extent, the ECTA. It enables legal representatives to use electronic communication to effect service of court documents, but original hard-copies must later be filed in court.¹⁴⁰ In August 2012 the Rules were altered to implement the ECTA provisions.¹⁴¹ Rule 4 requires proof that service is effected.¹⁴² In cases where the sheriff serves documents, return of service is proven by filing a certificate of service.¹⁴³ When service is effected by another person, such a person submits or files an affidavit.¹⁴⁴

The Rules also provide for service of the court documents from another jurisdiction effected on a South African or a person residing in South Africa.¹⁴⁵

'Service of any process of the court directed to the sheriff and subject to the provisions of paragraph (Aa) any document initiating application proceedings shall be effected by the sheriff in one or other of the following:

- (i) By delivering a copy thereof to the said person personally; provided that where such person is a minor or a person under legal disability, service shall be effected upon the guardian, tutor, curator or the like of such minor or person under disability;
- (ii) By leaving a copy thereof at a place of residence or business of the said person, guardian, tutor, curator or the like with the person apparently in charge of the premises of delivery, being a person apparently not less than 16 years of age for the purposes of this paragraph when a building is occupied by more than one person or family "residence, or place of business" means that portion of the building occupied by the person upon whom service is to be effected';
- (iii) By delivery of a copy thereof at the place of employment of the said person, guardian, tutor, curator or the like to some person apparently not less than sixteen years of age and apparently in authority over him;
- (iv) If the person so to be served has chosen a domicilium citandi, by delivering or leaving a copy thereof at the domicilium so chosen...

¹⁴⁰ Rule 4A of the Uniform Rules of Court and *CMC Woodworking machinery (Pty) Ltd v Odendaal Kitchens* para 8. Rule was amended by Government Gazette No 35450 in 2012. The amended Rule 4A of the Uniform Rules of Court states:

'(1) Service of all subsequent documents and notices, not falling under rule 4(1)(a), in any proceedings on any other party to the litigation may be effected by one or more of the following manners to the address or addresses provided by that party under rules 6(5)(b), 6(5)(d)(i), 17(3), 19(3) or 34(8), by: -

- (a) Hand at the physical address for service provided; or
- (b) Registered post to the postal address provided; or
- (c) Facsimile or *electronic mail* to the respective addresses provided.
- (2) An address for service, postal address, facsimile address or electronic address mentioned in sub-rule (1) may be changed by the delivery of notice of a new address and thereafter service may be effected as provided for in that sub-rule at such new address.
- (3) Chapter III, Part 2 of the Electronic Communications and Transactions Act, 2002 (Act No.25 of 2002) is applicable to service by facsimile or *electronic mail*.
- (4) Service under this rule need not be effected through the Sheriff.
- (5) The filing with the registrar or originals of documents and notices referred to in this rule shall not be done by way of facsimile or *electronic mail*".

¹⁴¹ *CMC Woodworking machinery (Pty) Ltd v Odendaal Kitchens* para 8.

¹⁴² Rule 4(6) of the Uniform Rules of Court.

¹⁴³ Rule 4(6) of the Uniform Rules of Court.

¹⁴⁴ Rule 4(6)(b) of the Uniform Rules of Court.

¹⁴⁵ Rule 4(11) of the Uniform Rules of Court.

An amendment provided via Government Gazette in 2015 provides that service of papers in annulment proceedings must ¹⁴⁶ be affected personally.¹⁴⁷ The proviso in divorce proceeding is that the court may decide that service be otherwise affected.¹⁴⁸

Rule 4 proves a need for amendment to enable parties to use e-technology or digital devices, to effect service of court proceedings. A draft of this proposed amendment is provided in chapter 5.

The Rules¹⁴⁹ permit substituted service where the whereabouts of a party is unknown, but he/she is residing within the Republic of South Africa.¹⁵⁰ The court has held that substituted service may be affected through Facebook. This was the first time where South African courts officially recognised social media as means of communication.¹⁵¹

Rule 5 deals with edictal citation.¹⁵² This in simple terms means that service may be affected outside the Republic of South Africa subject to certain conditions.¹⁵³ Namely, parties must apply to court for an order granting edictal citation.¹⁵⁴ The applying party must set out the cause of action or reasons for instituting the claim.¹⁵⁵

¹⁴⁶ Rule 44(1) of the Government Gazette 1 August 2015 No 39148.

¹⁴⁷ Rule 44(1) of the Government Gazette 1 August 2015 No 39148.

¹⁴⁸ Rule 44(1) of the Government Gazette 1 August 2015 No 39148.

¹⁴⁹ Rule 4(2) of the Uniform Rules of Court.

¹⁵⁰ *CMC Woodworking machinery (Pty) Ltd v Odendaal Kitchens* para 2 – 8.

¹⁵¹ *CMC Woodworking machinery (Pty) Ltd v Odendaal Kitchens* para 9- 12.

¹⁵² Rule 5(1) of the Uniform Rules of Court.

¹⁵³ Rule 5(2) of the Uniform Rules of Court.

¹⁵⁴ Rule 5(2) of the Uniform Rules of Court.

¹⁵⁵ Rule 5(2) of the Uniform Rules of Court.

Rule 6 sets out the manner in which application proceedings should be commenced.¹⁵⁶ The parties must serve and file notice of motion¹⁵⁷ supported by affidavits.¹⁵⁸ Rule 6 further requires that court papers be filed with the Registrar of court.¹⁵⁹ However, this Rule does not provide for electronic means of filing as does the Constitutional Court, which requires that a disk be submitted and saved to the courts' computer server.¹⁶⁰ This observation calls for an amendment to ensure compliance with the ECTA and other e-technology law.

Furthermore, the Rule provides that a party, who wishes to oppose a matter, may do so by delivering notice accompanied by ¹⁶¹ affidavit.¹⁶² Amendment to this rule in 2016 only affected electronic-mail.¹⁶³ It is averred that this amendment was insufficient.

¹⁵⁶ Rule 6 of the Uniform Rules of Court.
Government Gazette No 35450 amended rule 6 on 22 June 2012.

The amended version of rule 6 states

'Rule 6 of the Rules is hereby amended:

(a) by the substitution for paragraph (b) of sub-rule (5) for the following reasons:

(b) in [such] a notice of motion the applicant shall: -

- (i) Appoint an address within [eight] 15kilometres of the office of the registrar, at which [he] applicant will accept notice and service of all documents in such proceedings[.];
- (ii) State the applicant's postal, facsimile or *electronic mail* addresses where available; and
- (iii) [shall,] subject to the provisions of section 27 of the Act, set forth a day, not less than five days after service thereof on the respondent, on or before which such respondent is required to notify the applicant, in writing, whether [he] respondent intends to oppose such application, and shall further state that if no such notification is given the application will be set down for hearing on a stated day, not being less than 10 days after service on the said respondent of the said notice.

(c) By the substitution for paragraph (d) of sub-rule (5) for the following paragraph:

(d) Any person opposing the grant of an order sought in the notice of motion shall-

- (i) Within the time stated in the said notice, give applicant notice, in writing, that he or she intends to oppose the application, and in such notice appoint an address within [eight] 15 kilometres of the office of the registrar, as well as such person's postal, facsimile or electronic mail address where available;
- (ii) Within fifteen days of notifying the applicant of his or her intention to oppose the application, deliver his or her answering affidavit, if any, together with any relevant documents; and
- (iii) If he or she intends to raise any question of law only he or she shall deliver notice of his or her intention to do so, within the time stated in the preceding sub-paragraph, setting forth such question'.

¹⁵⁷ Rule 6(1) of the Uniform Rules of Court.

¹⁵⁸ Rule 6(1) of the Uniform Rules of Court.

¹⁵⁹ Rule 6(4) of the Uniform Rules of Court.

¹⁶⁰ Constitutional Court Rules.

¹⁶¹ Rule 6(4)(b) of the Uniform Rules of Court.

¹⁶² Rule 6(4)(b) of the Uniform Rules of Court.

¹⁶³ Rule 6(5)(b)(ii) of the Uniform Rules of Court, amended by Government Gazette 19 February No 39715.

Those who are party to such proceedings must be served with notice.¹⁶⁴ Once again, the manner of filing and serving does not support e-technology devices or instruments.¹⁶⁵ It is noted that Rule 4A provides for electronic communication, but Rule 6 should be similarly amended to incorporate the ECTA provisions in application proceedings. Rule 6 requires that notice to oppose must be in writing.¹⁶⁶ The meaning of writing should be drafted in a manner conforming to section 12 of the ECTA.¹⁶⁷ This will ensure adequate compliance with the ECTA. Parties may also be subpoenaed in application proceedings.¹⁶⁸ They can also be issued with subpoena *duces tecum* in terms of Rule 6.¹⁶⁹

In terms of Rule 8, the Registrar of the court issues summons.¹⁷⁰ This Rule does not accommodate the use of e-technology, digital or electronic communication. This demonstrates a need to amend the Rule to accommodate e-technology in issuing of summons and the filing process. The same applies to the process of issuing provisional sentence (considered a types of summons).¹⁷¹

¹⁶⁴ Rule 6(5) of the Uniform Rules of Court.

¹⁶⁵ Rule 6(5) of the Uniform Rules of Court.

¹⁶⁶ Rule 6(5)(b) of the Uniform Rules of Court and section 12 of the ECTA.

¹⁶⁷ Section 12 of the ECTA recognises data messages as 'writing'.

¹⁶⁸ Rule 6(5)(g) of the Uniform Rules of Court.

¹⁶⁹ Rule 6 of the Uniform Rules of Court.

¹⁷⁰ Rule 8(2) of the Uniform Rules of Court.

¹⁷¹ Rule 8(5) of the Uniform Rules of Court.

Rule 8 states: '...(1) Where by law any person may be summoned to answer a claim made for provisional sentence, proceedings shall be instituted by way of a summons as near as may be in accordance with Form 3 of the First Schedule calling upon such person to pay the amount claimed or, failing such payment, to appear personally or by counsel or by an attorney who, under section 4 (2) of the Right of Appearance in Courts Act, 1995 (Act 62 of 1995), has the right of appearance in the Supreme Court upon a day named in such summons, not being less than 10 days after the service upon him or her of such summons, to admit or deny his or her liability. [Subrule (1) amended by GN R2410 of 30 September 1991 and substituted by GN R1746 of 25 October 1996.]

(2) Such summons shall be issued by the registrar and the provisions of subrules (3) and (4) of rule 17 shall *mutatis mutandis* apply.

(3) Copies of all documents upon which the claim is founded shall be annexed to the summons and served with it.

(4) The plaintiff shall set down the case for hearing before noon on the court day but one preceding the day upon which it is to be heard.

(5) Upon the day named in the summons the defendant may appear personally or by an advocate or by an attorney who, under section 4 (2) of the Right of Appearance in Courts Act, 1995 (Act 62 of 1995), has the right of appearance in the Supreme Court to admit or deny his liability and may, not later than noon of the court day but one preceding the day upon which he or she is called upon to appear in court, deliver an affidavit setting forth the grounds upon which he or she disputes liability in which event the plaintiff shall be afforded a reasonable opportunity of replying thereto.

There is no reference in the Rules accommodating e-technology, digital and/or electronic means of filing. The Rule should be amended to facilitate the use of e-technology.

Rule 8 provides that notice to defend provisional sentence must be delivered.¹⁷² The manner of delivery is not illustrated in the Rule although delivery is defined in Rule 4. This rule should be amended to include digital, e-technology, and electronic means of communication. A draft amendment is provided in chapter 5.

Rule 13 provides that third party notices should be served and filed.¹⁷³ The manner of service and filing is not articulated in the Rule.

Rule 17 articulates the process followed to issue summons.¹⁷⁴ Summons is issued by the Registrar and served by the sheriff of the court.¹⁷⁵ The Rule places an obligation on the attorney acting on behalf of a client to sign the summons. Rule 17 was amended in 2012 to accommodate the ECTA and its provisions, albeit to a limited extent.¹⁷⁶

¹⁷² Rule 8 of the Uniform Rules of Court.

¹⁷³ Rule 13(1) to (3) of the Uniform Rules of Court.

¹⁷⁴ Rule 17 of the Uniform Rules of Court.

¹⁷⁵ Rule 17(1) to (3) of the Uniform Rules of Court.

¹⁷⁶ Government Gazette No. 35450 amended rule 17 as follows:

'Rule 17 of the Rules is hereby amended by the substitution for sub-rule (3) of the following sub-rule:

(3) (a) Every summons shall be signed by the attorney acting for the plaintiff and shall bear an attorney's physical address, within [eight] 15 kilometres of the office of the registrar, the attorney's postal address and, where available, the attorney's facsimile address and electronic mail address.

(b) [or, if] If no attorney is acting, [it] the summons shall be signed by the plaintiff, who shall in addition append an address within [eight] 15 kilometres of the office of the registrar at which [he] plaintiff will accept service of all subsequent documents in the suit [;], the plaintiff's postal address and where available, plaintiff's facsimile address and electronic mail address.

(c) [and] After paragraph (a) or (b) has been complied with [shall thereafter] the summons shall be signed and issued by registrar and made returnable by the Sheriff to the court through the registrar.

(d) the plaintiff may indicate in a summons whether the plaintiff is prepared to accept service of all subsequent documents and notices in the suit through any manner other than the physical address or postal address and, if so, shall state such preferred manner of service.

(e) If an action is defended the defendant may, at the written request of the plaintiff, deliver a consent in writing to the exchange or service by both parties of subsequent documents and notices in the suit by way of facsimile or electronic mail.

(f) If the defendant refuses or fails to deliver the consent in writing as provided for in paragraph (e), the court may, on application by the plaintiff, grant such consent, on such terms as to costs and otherwise as may be just and appropriate in the circumstances.

Rule 17 does not refer to the recognition of electronic signature¹⁷⁷ or advanced electronic signature¹⁷⁸ provided in section 13¹⁷⁹ of the ECTA, which describes a valid signature to include advanced electronic signature.¹⁸⁰ The construction of section 13 of the ECTA denotes that, if there is no specific type of signature referred to,¹⁸¹ advanced electronic signature will be accepted as valid signature in civil proceedings.¹⁸² According to Eiselen, recognition of electronic signature complies with international standards set out in UNCITRAL.¹⁸³ Eiselen interprets section 13 of the ECTA and avers a need to incorporate e-technology in South African law.¹⁸⁴ According to Watney, section 13 of the ECTA ought to be implemented thus validating electronic signatures.¹⁸⁵

Rule 18 likewise refers to signature but does not recognise electronic signature in pleadings.¹⁸⁶ Rule 18 requires parties to properly plead which includes pleadings relating to counterclaims; any failure to do so will result in an application for irregular proceedings as demonstrated in *Shell SA Marketing BPK v JG Wasserman h/a Wasserman Transport*.¹⁸⁷ The Applicant instituted proceedings in terms of Rule 30(1) relating to irregular proceeding. The Defendant had not filed counterclaim when its pleadings were referred to the court up until after the stage of *litis contestatio* was finalised.¹⁸⁸

¹⁷⁷ Section 1 of the ECTA 'electronic signature' is incorporated into the meaning of advanced signature.

¹⁷⁸ Section 1 and 13 of the ECTA.

¹⁷⁹ Section 13 supports manner in which electronic signature verified.

¹⁸⁰ Section 13 of the ECTA.

¹⁸¹ Section 13 of the ECTA.

¹⁸² Eiselen 2014 *PERJ* 2808 to 2820.

¹⁸³ Eiselen 2014 *PERJ* 2808 to 2820.

¹⁸⁴ Eiselen 2014 *PERJ* 2813 - 2816. Eiselen states: '...Section 13(4) provides that where an advanced electronic signature has been used, such a signature is regarded as being a valid electronic signature and to have been applied properly unless the contrary is proved...'

¹⁸⁵ Watney M 'Admissibility of Electronic Evidence in Criminal Proceedings: An Outline of the South African Legal Position 2009 *Journal of Information Law & Technology* 11.

¹⁸⁶ Rule 18 of the Uniform Rules of Court.

¹⁸⁷ *Shell SA Marketing BPK v JG Wasserman h/a Wasserman Transport* case no:681/2004 para 1.

¹⁸⁸ *Shell SA Marketing BPK v JG Wasserman h/a Wasserman Transport* case no:681/2004 para 2.

In 2014, after the ECTA was passed, the LSSA introduced guidelines to assist legal representatives to implement, comply with, and clarify the ECTA insofar as electronic signatures are concerned.¹⁸⁹ The Law Society drafted these guidelines to adhere to international standards relating to electronic signature¹⁹⁰ and because the rules in both the superior and lower courts require legal representatives to sign court papers before service.¹⁹¹ Some rules still require manual signature in the presence of witnesses.¹⁹² The rules also require the registrar and the clerk of the court to sign summons before issue and the same applies to other court papers.¹⁹³ It is common cause that legal representatives, as well as court officials, do not always use electronic signatures.¹⁹⁴ The guidelines make a distinction between electronic signature and digital signature.

The LSSA guidelines narrow the meaning of electronic signature to aid legal representatives.¹⁹⁵ They aver that the principles set out by Reed in relation to the meaning and interpretation of signature apply in practice.¹⁹⁶ The LSSA indicates that digital signatures fall within the description set out by Reed¹⁹⁷ and UNCITRAL.¹⁹⁸ The signature must be identified. Further, the intention of the person inserting a digital signature is significant in ensuring the signature is valid in South African law.¹⁹⁹

¹⁸⁹ LSSA *Electronic Signatures for South African Law Firms* 2014 1- 31 [Herein after referred to as the LSSA].

¹⁹⁰ LSSA *Electronic Signatures for South African Law Firms* 2014 1- 31

¹⁹¹ Uniform Rules of Court and the Magistrates Courts Rules.

¹⁹² Rule 17 and 18 and rule 31(1)(b) of the Uniform Rules of Court.

¹⁹³ Uniform Rules of Court and the Magistrates Courts Rules.

¹⁹⁴ Papadopoulos and Snail *The law of internet in South Africa* 316 - 332.

¹⁹⁵ LSSA *Electronic Signatures for South African Law Firms* 2014 4

¹⁹⁶ LSSA *Electronic Signatures for South African Law Firms* 2014 6. The LSSA makes reference to Prof Reed's work in highlighting the 'three primary functions of the signature'. The LLSA states that:

'...to accept signatures made in any manner that provide evidence of:

- ✓ The identity of the signatory;
- ✓ That the signatory intended a signature to be his or her signature; and
- ✓ That the writing or text to which the signature is associated is adopted or approved by the signatory.

It is submitted that the same principles apply to the use of manuscript signatures in South African Law'.

¹⁹⁷ LSSA *Electronic Signatures for South African Law Firms* 2014 7.

¹⁹⁸ LSSA *Electronic Signatures for South African Law Firms* 2014 7. According to LSSA, UNCITRAL 'identifies the following functions traditionally performed by signature in a paper-based environment: "...to identify a person; to provide certainty as to the personal involvement of that person in the act of signing to associate the person with the content of the document" and the LSSA avers that 'the same principles apply to signature in South African law'.

¹⁹⁹ LSSA *Electronic Signatures for South African Law Firms* 2014 7 - 16.

An exception to the above guidelines is in instances of dispute about the signature in which case the principle of 'he who alleges must prove' applies.²⁰⁰ The LSSA concurs with Christianson that digital signature is not the same as advanced electronic signature.²⁰¹ It is submitted that this is a correct interpretation because of the manner in which digital and advanced electronic signatures is affected and operated. Digital signatures must conform to legal and business requirements.²⁰² Furthermore, digital signatures are supported by cryptographic measure²⁰³ while electronic signatures ought to follow the accreditation criteria provided in section 37 of the ECTA.²⁰⁴

According to Siberman,²⁰⁵ the South African Receiver of Revenue successfully implements digital signatures which could be used efficiently in legal practice.²⁰⁶ Digital signatures are created using a digital pen on a touch-screen device.²⁰⁷ Van der Merwe²⁰⁸ states that the South African Receiver of Revenue is abreast with e-technology.²⁰⁹ He argues that SARS encourages the use of electronic signatures in practice.²¹⁰ Van Der Merwe indicates that POPI provisions are enforced when companies use specifically designed digital software such as 'Sign Flow'.²¹¹

²⁰⁰ LSSA *Electronic Signatures for South African Law Firms* 2014 7 - 16.

²⁰¹ LSSA *Electronic Signatures for South African Law Firms* 2014 15 - 16.

²⁰² LSSA *Electronic Signatures for South African Law Firms* 2014 15 - 16.

²⁰³ LSSA *Electronic Signatures for South African Law Firms* 2014 17 - 33.

²⁰⁴ LSSA *Electronic Signatures for South African Law Firms* 2014 17 - 33.

²⁰⁵ Siberman M 2011 Digital Signature TAXTalk <http://www.thesait.org.za/news/97732/Digital-Signatures.thm> (Date of Use: 25 January 2018)

²⁰⁶ Siberman M 2011 Digital Signature TAXTalk <http://www.thesait.org.za/news/97732/Digital-Signatures.thm> (Date of Use: 25 January 2018)

²⁰⁷ Siberman M 2011 Digital Signature TAXTalk <http://www.thesait.org.za/news/97732/Digital-Signatures.thm> (Date of Use: 25 January 2018)

²⁰⁸ Van der Merwe L What is an Advanced Electronic Signature (AES – South Africa) and do I need one?

<http://www.execusign.co.za/single-past/2017/04/30/What-is-an-Advanced-Electronic-Signature-AES-SouthAfrica> (Date of use: 22 January 2018).

²⁰⁹ Van der Merwe L What is an Advanced Electronic Signature (AES – South Africa) and do I need one?

<http://www.execusign.co.za/single-past/2017/04/30/What-is-an-Advanced-Electronic-Signature-AES-SouthAfrica> (Date of use: 22 January 2018).

²¹⁰ Van der Merwe L What is an Advanced Electronic Signature (AES – South Africa) and do I need one?

<http://www.execusign.co.za/single-past/2017/04/30/What-is-an-Advanced-Electronic-Signature-AES-SouthAfrica> (Date of use: 22 January 2018).

²¹¹ Van der Merwe Leon What is an Advanced Electronic Signature (AES – South Africa) and do I need one?

<http://www.execusign.co.za/single-past/2017/04/30/What-is-an-Advanced-Electronic-Signature-AES-SouthAfrica> (Date of use: 22 January 2018).

The LSSA also refer to scanned signature.²¹² Scanned signatures are regarded as electronic signatures if so intended by the person who inserts it onto a document.²¹³ Initials can be regarded as electronic signature.²¹⁴ The LSSA indicates that fingerprints amount to a hash-value used in e-technology.²¹⁵ The LSSA argues that the construction of advanced electronic signature, per the ECTA and other e-technology law, denotes that it falls within the meaning of digital signature.²¹⁶

The LSSA encourages legal representatives to implement electronic signatures²¹⁷ or digital signatures in practice.²¹⁸ There is however a need to review the current court rules to incorporate electronic and digital signatures following the LSSA guidelines and e-technology law.²¹⁹

Rule 19 was amended in 2012. The Rule now, to a certain extent, enables parties to use electronic-mail when notice of intention to defend is served.²²⁰ It makes provision for the defendant to give his/her facsimile or electronic-mail address. This implies that correspondence between the defendant and other party can take place by use of electronic device.

Rule 29 refers to close of pleading. Parties are obliged to properly plead and file counterclaims before this stage.

²¹² LSSA *Electronic Signatures for South African Law Firms* 2014 15 - 17.
LSSA states in page 17 that: 'Attention is also drawn to the rather common misconception that a manuscript which has been scanned and has been attached or placed in a document constitutes an electronic signature. The scanned image may well be an electronic signature, but the governing factor is whether the signatory intended that the scanned signature in fact be used as a signature. Absent this intention it cannot be regarded as the signatory's signature'.

²¹³ LSSA *Electronic Signatures for South African Law Firms* 2014 15 - 17.

²¹⁴ LSSA *Electronic Signatures for South African Law Firms* 2014 18.

²¹⁵ LSSA *Electronic Signatures for South African Law Firms* 2014 20.

²¹⁶ LSSA *Electronic Signatures for South African Law Firms* 2014 20.

²¹⁷ LSSA *Electronic Signatures for South African Law Firms* 2014 20.

²¹⁸ LSSA *Electronic Signatures for South African Law Firms* 2014 28.

²¹⁹ Herselman ME and Hay HR Challenges Posed by Information and Communication Technologies (ICT) for South African Higher Education Institutions 2003
<http://www.pdfs.semanticscholar.org/a434/121bbcb047d1415fb0d2720874868f2a6fbab.pdf>
(Date of use: 22 January 2018)

²²⁰ Government Gazette No.35450 amended rule 19(3) of the Uniform Rules of Court as follows:
'(3) (a) When a defendant delivers notice of intention to defend, [he] defendant shall therein give [his] defendant's full residential address or business address, postal address and where available, facsimile address and electronic mail address and shall also appoint an address, not being a post office box or poste restante, within [eight] 15 kilometres of the office of the registrar, for the service on [him] defendant thereof of all documents in such action, and service thereof at the address so given shall be valid and effectual, except where by any order or practice of the court personal service is required....'

This is referred to as *litis contestatio in* common law.²²¹ The court has previously held that parties must deliver counterclaim at the same time as filing plea.²²² There is a need to amend the Rule to incorporate electronic means of filing or delivering of a counterclaim.

Rule 19 requires personal service or delivery of notice of intention.²²³ This Rule is problematic in that it lacks recognition of the use of e-technology to effect service.²²⁴ Rule 19 also requires the defendant to supply address details when filing the notice to defendant so that documents can be served properly.²²⁵ It is relevant to discuss this Rule because it requires modification in-line with the ECTA provisions and other e-technology law.

Rule 20 obligates the plaintiff to deliver a declaration.²²⁶ Declaration is delivered after the defendant files notice of intention to defend.²²⁷

Another rule that does not embrace e-technology is Rule 21.²²⁸ The Rule forces parties to deliver notice when requesting further information necessary for the proceedings and not pleaded in the respective pleadings.²²⁹ The manner of delivery is not expressly articulated in the Rule; there is no reference to e-technology devices to affect delivery.²³⁰

Rule 22 supports the delivery of plea by the defendant after receiving a declaration.²³¹

²²¹ *Shell SA Marketing BPK v JG Wasserman h/a Wasserman Transport* case no:681/2004 para 2 and rule 29 of the Uniform Rules of Court.

²²² *Shell SA Marketing BPK v JG Wasserman h/a Wasserman Transport* case no:681/2004 para 20

²²³ Rule 19(1) of the Uniform Rules of Court.

²²⁴ Rule 19(1) of the Uniform Rules of Court.

²²⁵ Rule 19(3) of the Uniform Rules of Court.

²²⁶ Rule 20 of the Uniform Rules of Court.

²²⁷ Rule 20 of the Uniform Rules of Court.

²²⁸ Rule 21 of the Uniform Rules of Court.

²²⁹ Rule 21 of the Uniform Rules of Court.

²³⁰ Rule 21 of the Uniform Rules of Court.

²³¹ Rule 22 of the Uniform Rules of Court.

Rule 23 deals with delivery of notice to except or strike out.²³² Other notices that ought to be delivered are notice of bar²³³ and notice to amend pleadings.²³⁴

²³² Rule 23 of the Uniform Rules of Court. Rule 23 states:

- '...(1) Where any pleading is vague and embarrassing or lacks averments which are necessary to sustain an action or defence, as the case may be, the opposing party may, within the period allowed for filing any subsequent pleading, deliver an exception thereto and may set it down for hearing in terms of paragraph (f) of subrule (5) of rule (6): Provided that where a party intends to take an exception that a pleading is vague and embarrassing he shall within the period allowed as aforesaid by notice afford his opponent an opportunity of removing the cause of complaint within 15 days: Provided further that the party excepting shall within ten days from the date on which a reply to such notice is received or from the date on which such reply is due, deliver his exception. [Subrule (1) amended by GN R2164 of 1987, by GN R2642 of 1987 and by GN R1262 of 1991.]
- (2) Where any pleading contains averments which are scandalous, vexatious, or irrelevant, the opposite party may, within the period allowed for filing any subsequent pleading, apply for the striking out of the matter aforesaid, and may set such application down for hearing in terms of paragraph (f) of subrule (5) of rule (6), but the court shall not grant the same unless it is satisfied that the applicant will be prejudiced in the conduct of his claim or defence if it be not granted.
- (3) Wherever an exception is taken to any pleading, the grounds upon which the exception is founded shall be clearly and concisely stated.
- (4) Wherever any exception is taken to any pleading or an application to strike out is made, no plea, replication or other pleading over shall be necessary...'

²³³ Rule 26 of the Uniform Rules of Court. Rule 26 states: '...Any party who fails to deliver a replication or subsequent pleading within the time stated in rule 25 shall be *ipso facto* barred. If any party fails to deliver any other pleading within the time laid down in these Rules or within any extended time allowed in terms thereof, any other party may by notice served upon him require him to deliver such pleading within five days after the day upon which the notice is delivered. Any party failing to deliver the pleading referred to in the notice within the time therein required or within such further period as may be agreed between the parties, shall be in default of filing such pleading, and *ipso facto* barred: Provided that for the purposes of this rule the days between 16 December and 15 January, both inclusive shall not be counted in the time allowed for the delivery of any pleading...'

²³⁴ Rule 28 of the Uniform Rules of Court. Rule 28 states:

- '... (1) Any party desiring to amend a pleading or document other than a sworn statement, filed in connection with any proceedings, shall notify all other parties of his intention to amend and shall furnish particulars of the amendment.
- (2) The notice referred to in subrule (1) shall state that unless written objection to the proposed amendment is delivered within 10 days of delivery of the notice, the amendment will be effected.
- (3) An objection to a proposed amendment shall clearly and concisely state the grounds upon which the objection is founded.
- (4) If an objection which complies with subrule (3) is delivered within the period referred to in subrule (2), the party wishing to amend may, within 10 days, lodge an application for leave to amend.
- (5) If no objection is delivered as contemplated in subrule (4), every party who received notice of the proposed amendment shall be deemed to have consented to the amendment and the party who gave notice of the proposed amendment may, within 10 days after the expiration of the period mentioned in subrule (2), effect the amendment as contemplated in subrule (7).
- (6) Unless the court otherwise directs, an amendment authorized by an order of the court may not be effected later than 10 days after such authorization.
- (7) Unless the court otherwise directs, a party who is entitled to amend shall effect the amendment by delivering each relevant page in its amended form.
- (8) Any party affected by an amendment may, within 15 days after the amendment has been effected or within such other period as the court may determine, make any consequential

The manner of delivery in the Rules is not expressly articulated and there is no reference to e-technology or digital means of effecting delivery.²³⁵ This calls for further amendment to the Rules to include e-technology and digital means of effecting delivery.

Rule 31 obligates the defendant to sign papers in front of witnesses.²³⁶ There is no reference to electronic signature in the Rule. In fact, interpretation of this Rule draws an inference that the signature needed is a hand-written signature. This is not in-line with section 13 of the ECTA.

Christianson confirms that South African court processes have come a long way from handwritten to electronic signature.²³⁷ Christianson makes a distinction between advanced electronic and other electronic signature.²³⁸ Van der Merwe *et al* argue that electronic signature should be accepted when it conforms to legal requirements.²³⁹

adjustment to the documents filed by him, and may also take the steps contemplated in rules 23 and 30.

(9) A party giving notice of amendment in terms of subrule (1) shall, unless the court otherwise directs, be liable for the costs thereby occasioned to any other party.

(10) The court may, notwithstanding anything to the contrary in this rule, at any stage before judgment grant leave to amend any pleading or document on such other terms as to costs or other matters as it deems fit..'

²³⁵ Rules 21-23 of the Uniform Rules of Court.

²³⁶ Rule 31 of the Uniform Rules of Court.

²³⁷ Christianson D 'Advanced Electronic Signatures' 2012 *De Rebus* 69. Christianson avers that:

"it is now possible to achieve the same end with a few simple key strokes on a computer, thanks to innovative software development and legislative recognition of the rapidly changing manner in which business is done. The accreditation of authentication products and services in terms of s37 of the Electronic Communications and Transactions Act 25 of 2002 (ECTA) allows for the electronic signatures of such products and services to qualify as advanced electronic signatures, thus safeguarding the authenticity of the signature'.

²³⁸ Christianson 2012 *De Rebus* 69. Christainson argues that: 'Electronic signatures must be distinguished from advanced electronic signatures. The important factor is whether the signature is required by law. While the ECTA recognises other forms of electronic signatures used between parties in an electronic transaction (eg a private agreement), these will not be recognized if the signature is required by laws (eg signatures required in terms of the Companies Act 71 of 2008). Where the signature of a person required by law and such law does not specify the type of signature, that requirement in relation to a data message is met only if advanced electronic signature is used (s13)(1) of the ECTA)'. It is important to highlight that a signature required by law for example, refers to a signature that is considered in terms of common law as a mark made in a document to approve and acknowledge the contents and it identifies the person who actually makes such a mark. In terms the ECTA, advanced electronic signature refers to a signature that is inserted in data text, which complies with accredited authority as per the provisions of section 37 of the ECTA.

²³⁹ Van der Merwe *et al* *Information and Communications Technology Law* 177 – 179.

Put differently, the parties must insert or use an advanced electronic signature in order to validate the signature.²⁴⁰

These scholars refer to the decision in *Spring Forest Trading v Wilberry*²⁴¹ where the court considered whether e-mails amounted to valid signature and writing as per the ECTA provisions.²⁴² Van der Merwe *et al* indicate that there were no signatures *per se* in the e-mails sent but there were initials.²⁴³ The court had to determine whether e-mails with names at the end amounted to valid signatures.²⁴⁴ The court interpreted sections 13(1) and (3) and applied the provisions to the facts.²⁴⁵ It held that if the parties do not demonstrate the type of signature required in a document, section 13 of the ECTA applies and therefore:²⁴⁶

“...the requirement for an ‘electronic signature’ – a brief discussion on how the courts generally approach signature requirements is necessary. Commonly understood a signature is ‘a person’s name written in a distinctive way as a form of identification...’ But this is not the only way the law requires a document to be signed. In the days before electronic communication, the courts were willing to accept any mark made by a person for the purpose of attesting a document, or identifying it as his act, to be a valid signature. They went even further and accepted a mark made by a magistrate for a witness, whose participation went only as far as symbolically touching the magistrate’s pen...”²⁴⁷

Where specification is made concerning the type of signature, the ECTA will not apply.²⁴⁸ Therefore, the court held:

“...Here the parties did require a signature to cancel the agreement, but when they cancelled the agreement by email they did not specify the type of electronic signature that was required. So, the section does apply in the circumstances of this case. The typewritten names of the parties at the foot of the emails, which were used to identify the users, constitute ‘data’ that is logically associated with the data in the body of the emails, as envisaged in the definition of an ‘electronic

²⁴⁰ Van der Merwe *et al* *Information and Communications Technology Law* 177 – 179.

²⁴¹ *Spring Forest Trading v Wilberry* 2014 ZASCA 178.

²⁴² *Spring Forest Trading v Wilberry* 2014 ZASCA 178 para 2 and Van der Merwe *et al* *Information and Communications Technology Law* 178.

²⁴³ Van der Merwe *et al* *Information and Communications Technology Law* 178.

²⁴⁴ *Spring Forest Trading v Wilberry* 2014 ZASCA 178 para 2 and Van der Merwe *et al* *Information and Communications Technology Law* 178.

²⁴⁵ *Spring Forest Trading v Wilberry* 2014 ZASCA 178 para 28 and Van der Merwe *et al* *Information and Communications Technology Law* 178 - 179.

²⁴⁶ *Spring Forest Trading v Wilberry* 2014 ZASCA 178 para 28 and Van der Merwe *et al* *Information and Communications Technology Law* 178 - 179.

²⁴⁷ *Spring Forest Trading v Wilberry* 2014 ZASCA 178 para 25.

²⁴⁸ *Spring Forest Trading v Wilberry* 2014 ZASCA 178 para 28 and Van der Merwe *et al* *Information and Communications Technology Law* 178 - 179.

signature'. They therefore satisfy the requirement of a signature and had the effect of authenticating the information contained in the emails..."²⁴⁹

It appears that the Rules must be changed to accommodate advanced electronic signature in practice. Papadopoulos and Snail discuss and interpret section 13 of the ECTA and they aver that data messages may be regarded as valid signature.²⁵⁰ Furthermore, in instances when parties are compelled by law to sign,²⁵¹ advanced electronic signature will be invoked.²⁵² Papadopoulos and Snail indicate that South African law should also comply with international standards.²⁵³ They argue that hand-written signature should be replaced with electronic signature where it feasible to do so and where the parties have access to e-technology.²⁵⁴ South African processes must move away from traditional ways of doing things and keep abreast with e-technology.²⁵⁵

Rule 35 assists parties to obtain information or evidence relevant to trial.²⁵⁶ Rule 35 states:

"... (1) Any party to any action may require any other party thereto, by notice in writing, to make discovery on oath within twenty days of all documents and tape recordings relating to any matter in question in such action (whether such matter is one arising between the party requiring discovery and the party required to make discovery or not) which are or have at any time been in the possession or control of such other party. Such notice shall not, save with the leave of a judge, be given before the close of pleadings..."²⁵⁷

A critical analysis of this Rule reveals that it helps parties prepare for proceedings.²⁵⁸ Miller and Verloren confirm that discovery hastens civil proceedings because having evidence at their disposal adequately assists parties to prepare for the proceeding.²⁵⁹

²⁴⁹ *Spring Forest Trading v Wilberry* 2014 ZASCA 178 para 28

²⁵⁰ Papadopoulos and Snail *The law of the internet in South Africa* 49.

²⁵¹ Papadopoulos and Snail *The law of the internet in South Africa* 49.

²⁵² Papadopoulos and Snail *The law of the internet in South Africa* 49.

²⁵³ Papadopoulos and Snail *The law of the internet in South Africa* 49.

²⁵⁴ Papadopoulos and Snail *The law of the internet in South Africa* 51.

²⁵⁵ Papadopoulos and Snail *The law of the internet in South Africa* 51.

²⁵⁶ *Pete et al Civil Procedure* 693.

²⁵⁷ Rule 35(1) of the Uniform Rules of Court.

²⁵⁸ Rule 35 of the Uniform Rules of Court.

²⁵⁹ Miller BA and Verloren AA 'Discovery at the NLRB-Why Not' 2005 *The Wayne Law Review* Vol. 51 107 127.

This is so because parties are privy to information relevant to litigation. Notice to discover must be given to the respective party.²⁶⁰

The Rules oblige the parties to discover, under oath, via affidavit.²⁶¹ The Rule does not expressly provide for the use of digital or e-technology discovery.²⁶² Sirenya and van Rooyen assert that it is prudent to comply with Rule 35 to ensure that documents or evidence necessary for the trial are disclosed.²⁶³ These writers refer to a decision in *Centre for Child Law v Hoerskool Fochville and Another*,²⁶⁴ where the Supreme Court of Appeal said that parties cannot get away from disclosing relevant evidence by claiming that such information is confidential.²⁶⁵

According to Watney, electronically produced documents are not abreast with current developments.²⁶⁶ Watney further acknowledges that there is a need to develop South African law in-line with e-technology changes.²⁶⁷ Further, the current law ought to comply with ECTA provisions insofar as the use and admissibility of electronic evidence is concerned.²⁶⁸ Watney further argues that data evidence must meet the requirements in section 15 of the ECTA because this section “...creates a *rebuttable presumption*”²⁶⁹ that must be proved when data text evidence is challenged.²⁷⁰

Watney confirms that computer evidence deserves recognition.²⁷¹ It appears that Watney's averment is important in the discovery of data produced as evidence in civil proceedings because legal representatives use computers and other e-technology devices. The same applies to their clients; business is slowly moving towards digital e-technology and it is therefore pertinent to discover evidence produced by e-technology devices.

²⁶⁰ Rule 35(1) of the Uniform Rules of Court.

²⁶¹ Rule 35(2) of the Uniform Rules of Court.

²⁶² Rule 35 of the Uniform Rules of Court.

²⁶³ Sirenya M and van Rooyen C Rule 35(12) of the Uniform Rules: Be wary 2017 *De Rebus* Vol. 1.22.

²⁶⁴ *Centre for Child Law v Hoerskool Fochville and Another* 2016 (2) SA 121SCA.

²⁶⁵ *Centre for Child Law v Hoerskool Fochville and Another* 2016 (2) SA 121SCA.

²⁶⁶ Watney 2009 *Journal of Information Law & Technology* 3.

²⁶⁷ Watney 2009 *Journal of Information Law & Technology* 3.

²⁶⁸ Watney 2009 *Journal of Information Law & Technology* 3.

²⁶⁹ Watney 2009 *Journal of Information Law & Technology* 11.

²⁷⁰ Watney 2009 *Journal of Information Law & Technology* 8.

²⁷¹ Watney 2009 *Journal of Information Law & Technology* 11.

Van Dorsten acknowledges that most documents are created electronically.²⁷² Therefore, it is important to ensure that parties are familiar with all evidence adduced during civil proceedings.²⁷³ The discovery process, according to Van Dorsten, assists parties to eliminate irrelevant evidence and, given that many documents are created via computer; the court may require a party to discover electronically.²⁷⁴

Cassim states that the ultimate goal of discovery is to obtain relevant information that will enable parties to prepare for and succeed or defend the matter.²⁷⁵ Cassim argues that there may be cases where it is necessary to discover electronic documents.²⁷⁶ She argues that if electronic discovery does not occur when necessary, the other party will suffer prejudice.²⁷⁷ Cassim asserts that as much as it is important to comply with electronic discovery, the latter must be authentic.²⁷⁸ Put differently, the original documents ought to be submitted.²⁷⁹ Cassim argues that section 15 of the ECTA changed the latter position.²⁸⁰ She makes a distinction between the meaning of electronic discovery and paper discovery:

“Electronic discovery refers to the discovery of electronically stored information. This includes e-mail, webpages, word processing files, computer data-bases, any information that is stored on a computer or other electronic device. Electronically stored information is said to be electronic if it exists in a medium that can be read through the use of computers or other digital devices. Such media may include cache memory, magnetic disks such as DVD or CDs, and magnetic tapes. On the other hand, paper discovery refers to the discovery of writings on paper (printed words) that can be read without the aid of electronic devices.”²⁸¹

Cassim points out that the decision in the *Le Roux* case covered the meaning of electronically stored information.²⁸²

²⁷² Van Dorsten J ‘Discovery of electronic documents and attorneys’ obligations’ 2012 *De Rebus* Vol. 67 34 - 36.

²⁷³ Van Dorsten 2012 *De Rebus* 34.

²⁷⁴ Van Dorsten 2012 *De Rebus* 34

²⁷⁵ Cassim *Use of Electronic Evidence in South African Law Embracing Technical Change* 85.

²⁷⁶ Cassim *Use of Electronic Evidence in South African Law Embracing Technical Change* 85.

²⁷⁷ Cassim *Use of Electronic Evidence in South African Law Embracing Technical Change* 85.

²⁷⁸ Cassim *Use of Electronic Evidence in South African Law Embracing Technical Change* 86.

²⁷⁹ Cassim *Use of Electronic Evidence in South African Law Embracing Technical Change* 86.

²⁸⁰ Cassim *Use of Electronic Evidence in South African Law Embracing Technical Change* 86.

Cassim argues that section makes it possible to believe or presume that data messages may be used during the proceedings.

²⁸¹ Cassim *Use of Electronic Evidence in South African Law: Embracing Technical Change* 86.

²⁸² Cassim *Use of Electronic Evidence in South African Law: Embracing Technical Change* 86.

Le Roux and Others v Viana NO and others correctly defined documents to include electronic information.²⁸³ In this case, the court had to determine whether documents fell within the meaning of electronic communication.²⁸⁴ This case relates to the application of section 69(3) of the Insolvency Act 24 of 1934 but narrows down the meaning of documents contained in a hard-drive.²⁸⁵ The gist of the issue was whether documents in a hard-drive could be seized.²⁸⁶ The court interpreted the meaning of documents and books and held that information contained in a hard-drive was subject to seizure.²⁸⁷ The fact that such information was saved on a hard-drive, did not mean that it could not be disclosed for the purposes of litigation.²⁸⁸

Cassim criticises electronic discovery and argues that its implementation may be construed as expensive.²⁸⁹ Furthermore, she argues that electronic discovery may be viewed as complex.²⁹⁰ She sets out certain factors, which, she avers, problematize electronic discovery.²⁹¹

²⁸³ Van Dorsten 2012 *De Rebus* 34.

²⁸⁴ *Le Roux and Others v Viana NO and others* 2008 (2) SA 173 SCA.

²⁸⁵ *Le Roux and Others v Viana NO and others* 2008 (2) SA 173 SCA para 1 - 4.

²⁸⁶ *Le Roux and Others v Viana NO and others* 2008 (2) SA 173 SCA para 1 - 6.

²⁸⁷ *Le Roux and Others v Viana NO and others* 2008 (2) SA 173 SCA para 9- 10.

²⁸⁸ *Le Roux and Others v Viana NO and others* 2008 (2) SA 173 SCA para 9- 10.

²⁸⁹ Cassim *Use of Electronic Evidence in South African Law: Embracing Technical Change* 86.

²⁹⁰ Cassim *Use of Electronic Evidence in South African Law: Embracing Technical Change* 86.

²⁹¹ Cassim *Use of Electronic Evidence in South African Law: Embracing Technical Change* 86. Cassim states: 'Electronic discovery can be regarded as a complex and expensive exercise because of the following factors:

- The huge volume and number of messages;
- The difficulty of erasing electronic data from hard-drives;
- The problem with metadata (information that is contained in electronic documents). For example, e-mail data elements include the dates the mail was sent, received, replied to or forwarded;
- The contents are forever changing. The metadata elements also change each time a spreadsheet or word-processed document is copied. The question of which is the best "document" for discovery creates problems for discovery;
- Electronic data cannot be separated from its environment. To illustrate this, information in a database requires an application for interpretation, so an application is necessary;
- Upgrades and technological changes may also impact on the recovery data. The necessary personnel or technological infrastructure may not be available when the data need to be accessed;
- Different locations of electronic data: while documents can be boxed or stored in filing cabinets, electronically stored information can reside in many locations, such as desktop hard-drives, laptop computers, network servers, floppy disks, CDs, and backup tapes and have similar copies;
- It could be an expensive exercise to engage the services of computer forensic experts (Cilliers *et al* 2009)'.

She makes critical and valid points pertinent to real-life and avers that the volume of documents can result in expense to the parties concerned.²⁹² She further indicates that it may be difficult to recover data due to constant development of e-technology.²⁹³ Cassim's views are noted with appreciation as they highlight realistic problems encountered by many who use computers daily.²⁹⁴ It is however argued that there are means to circumvent these problems.

According to Cassim, discovery is important in practice and includes electronic discovery.²⁹⁵ Cassim indicates that there is a risk in discovering electronically stored information.²⁹⁶ A third party, often a service provider controls the stored information.²⁹⁷ This may be a compliance risk in terms of POPI. If parties refuse to discover personal information in compliance with POPI, the court may dismiss the matter or strike out the defence.²⁹⁸ Cassim however concludes that electronic discovery may be used in compliance with Rule 35 of the Uniform Rules of Court as well as Rule 23 of the Magistrates' Courts' Rules.²⁹⁹

She argues though that Rule 35 of the Uniform Rules of Court does not implement electronic discovery because there is no reference to digital or electronic discovery of evidence whilst, in practice, evidence is produced digitally or through electronic means.³⁰⁰ This is a reason there is a need to modify Rule 35 to incorporate digital or electronically produced evidence. Cassim confirms that the process of invoking an electronic copy in civil proceedings is enough to comply with the meaning of *document* as per ECTA provisions.³⁰¹

²⁹² Cassim *Use of Electronic Evidence in South African Law: Embracing Technical Change* 86.

²⁹³ Cassim *Use of Electronic Evidence in South African Law: Embracing Technical Change* 86.

²⁹⁴ Challenges facing IT www.techrepublic.com/blog/10-things/10-challenges-facing-it (Date of Use: 30 January 2018).

²⁹⁵ Cassim 2017 *Journal for Juridical Science* 24-25.

²⁹⁶ Cassim 2017 *Journal for Juridical Science* 24-25.

²⁹⁷ Cassim 2017 *Journal for Juridical Science* 24-25.

²⁹⁸ Rule 35(7) of the Uniform Rules of Court and Cassim 2017 *Journal for Juridical Science* 24-25. Rule 35(7) states: '...If any party fails to give discovery as aforesaid or, having been served with a notice under subrule (6), omits to give notice of a time for inspection as aforesaid or fails to give inspection as required by that subrule, the party desiring discovery or inspection may apply to a court, which may order compliance with this rule and, failing such compliance, may dismiss the claim or strike out the defence...'

²⁹⁹ Cassim 2017 *Journal for Juridical Science* 24-25.

³⁰⁰ Cassim 2017 *Journal for Juridical Science* 24-25.

³⁰¹ Cassim 2017 *Journal for Juridical Science* 29.

Cassim says personal information may be stored in the cloud computer.³⁰² Business is forced to keep and distribute personal information in a manner that demonstrates accountability.³⁰³

Like Cassim, Hoornstra and Liethen assert that discovery is an important process in litigation.³⁰⁴ They indicate that this process enables parties to have important information that will enable them to properly prepare and defend the matter before court.³⁰⁵ They also indicate that the key is that the information must be relevant to the matter to be discovered.³⁰⁶ These scholars³⁰⁷ caution that parties to civil proceedings should guard against broadening the scope of discovery,³⁰⁸ hence they should ensure that only relevant information is discovered.

Unlike the earlier commentators, Papadopoulos and Snail share different views on the application of Rule 35 in electronic evidence.³⁰⁹ They indicate that, although the Rule does not expressly recognise electronic discovery, parties to civil litigation can comply with Rule 35 by invoking electronic discovery.³¹⁰ This view was supported in *Motata*,³¹¹ where video-clips were admitted as evidence during proceedings.³¹²

Papadopoulos and Snail argue that the Rule is silent about the manner in which documents should be discovered.³¹³ They confirm that Rule 35, in its current form, complies with e-technology developments.³¹⁴

³⁰² Cassim 2017 *Journal for Juridical Science* 29.

LSSA 2015 describe cloud computer as: "Cloud computing" is an expression used to describe a variety of different computing models that involve a number of computers connected via the Internet. The term is generally used to describe third party hosted services that run server-based software from a remote location.

³⁰³ Cassim 2017 *Journal for Juridical Science* 29.

³⁰⁴ Hoornstra CD and Liethen MA 'Academic Freedom and Civil Discovery' 1983-84 *Journal of College and University Law* Vol. 10 113- 128; Cassim 2017 *Journal for Juridical Science* 24-25 and Cassim *Use of Electronic Evidence in South African Law Embracing Technical Change* 86.

³⁰⁵ Hoornstra and Liethen 1983-84 *Journal of College and University Law* 115; Cassim 2017 *Journal for Juridical Science* 24-25 and Cassim *Use of Electronic Evidence in South African Law Embracing Technical Change* 86.

³⁰⁶ Hoornstra and Liethen 1983-84 *Journal of College and University Law* 115 - 117.

³⁰⁷ Hoornstra and Liethen 1983-84 *Journal of College and University Law* 115 - 117.

³⁰⁸ Hoornstra and Liethen 1983-84 *Journal of College and University Law* 115 - 117.

³⁰⁹ Papadopoulos and Snail *The law of the internet in South Africa* 328.

³¹⁰ Papadopoulos and Snail *The law of the internet in South Africa* 328.

³¹¹ *Motata v Nair No and Another* 2008 ZAFSHC.

³¹² *Motata v Nair No and Another* 2008 ZAFSHC.

³¹³ Papadopoulos and Snail *The law of the internet in South Africa* 328.

³¹⁴ Papadopoulos and Snail *The law of the internet in South Africa* 328.

They state that courts follow the approach taken in *Motata* where there is a dispute regarding electronic discovery.³¹⁵ Thus, courts use their discretion to confirm admissibility of electronically discovered evidence.³¹⁶ For example, courts consider the authenticity of electronic evidence and determine whether there was tampering before it admits such evidence.³¹⁷

Nieman suggests that data includes videos.³¹⁸ Cassim, as stated above, supports this view. Nieman further illustrates that electronic evidence is stored.³¹⁹ This occurs digitally and electronically, and this information may be used in litigation.³²⁰

Papadopoulos and Snail, who suggest that it is feasible to use this information for discovery purposes, as it may be important to the matter before the court, support Nieman's view.³²¹ Cassim also supports Nieman's views in that she professes that there is a need to use and accept evidence produced by e-technology devices in civil litigation in order to keep abreast with advancing e-technology.³²² Analysis of Nieman's description of electronic evidence demonstrates that parties, in practice, may discover electronically and the rules must incorporate and accommodate electronic discovery.

In *Capricorn Makelaars BPK v EB Shelf Investment Pty Ltd and Others*, an application was brought before court to consider the applicability of Rule 35(14).³²³

³¹⁵ Papadopoulos and Snail *The law of the internet in South Africa* 328 - 329.

³¹⁶ Papadopoulos and Snail *The law of the internet in South Africa* 328 - 329.

³¹⁷ *Motata v Nair No and Another* 2008 ZAFSHC.

³¹⁸ Nieman A *Search and seizure, production and preservation of electronic evidence* (LLD thesis Potchefstroom North West University 2006) 36.

³¹⁹ Nieman *Search and seizure* 36. According to Nieman '... electronic evidence is electronically stored information that can be used as evidence in any legal action. This includes any information of probative value that is either stored or transmitted in a binary form, by means of, for example, cellular phones, digital fax machines, digital audio and digital video. Electronic evidence for the purposes of this thesis is defined as a probative binary data that is stored or transmitted by means of a computer system. The term electronic evidence, digital evidence and e-evidence are used interchangeably, as they all constitute binary evidence accrued from computing environments. Generally, there are two types of electronic evidence, namely physical and logical electronic evidence...'

³²⁰ Nieman *Search and seizure* 36.

³²¹ Papadopoulos and Snail *The law of the internet in South Africa* 328 - 329.

³²² Cassim 2017 *Journal for Juridical Science* 24-25 and Cassim *Use of Electronic Evidence in South African Law Embracing Technical Change* 86.

³²³ *Capricorn Makelaars BPK v EB Shelf Investment Pty Ltd* case no 841/2004 para 1.

Rule 35(14) states: '...After appearance to defend has been entered, any party to any action may, for purposes of pleading, require any other party to make available for inspection within five days a clearly specified document or tape recording in his possession which is relevant to a reasonably anticipated issue in the action and to allow a copy or transcription to be made thereof...'

There was a request to discover invoices about the sale of computers and a projector.³²⁴ The request was refused prompting the Applicant to ask the court to decide whether there was a need to discover the invoices.³²⁵ It was argued that there was a possibility that discovery could infringe on the right to privacy entrenched in section 14 of the Constitution.³²⁶ Paterson, the Defendant's representative,³²⁷ raised a concern on the early discovery of the evidence.³²⁸ The court held:

"...I think it may now help if one approaches the interpretation and application of the rule in the context of the rights and interests articulated in, or underlying, the Constitution, and not solely, or primarily, in its historical context. What one then finds, I venture to suggest, is that what underlies the caution expressed in the case law is a concern for the individual's right to privacy, now fundamentally enshrined in the Bill of Rights. That is obviously a legitimate concern, but it is counterbalanced by everyone's fundamental right of access to any information that is held by another person and that is required for the exercise or protection of any rights. The extension of this fundamental right to information held by private bodies has been described by the Supreme Court of Appeal as "unmatched in human rights jurisprudence", but I do not think the description was intended as justification for a restrictive interpretation of the right..."³²⁹

The court held that parties should discover information relevant to the matter for litigation.³³⁰ The court professed that because the main issue stemmed from the sale and the delivery of computers and projectors,³³¹ it was necessary to disclose and discover the invoices.³³² In coming to its conclusion, the court considered jurisprudence and held that:

"...If discovery is indeed a 'mighty engine for exposing truth' then the purpose of rule 35 (14), to expose the truth earlier rather than later, would be undermined by restricting its ambit to 'necessity' instead of "reasonably required in the circumstances" as explained in the Clutchco case..."³³³

The court held that discovery should be shown as reasonably required in a particular case.³³⁴

³²⁴ *Capricorn Makelaars BPK v EB Shelf Investment Pty Ltd* case no 841/2004 para 1.

³²⁵ *Capricorn Makelaars BPK v EB Shelf Investment Pty Ltd* case no 841/2004 para 1.

³²⁶ *Capricorn Makelaars BPK v EB Shelf Investment Pty Ltd* case no 841/2004 para 8.

³²⁷ *Capricorn Makelaars BPK v EB Shelf Investment Pty Ltd* case no 841/2004 para 8.

³²⁸ *Capricorn Makelaars BPK v EB Shelf Investment Pty Ltd* case no 841/2004 para 8.

³²⁹ *Capricorn Makelaars BPK v EB Shelf Investment Pty Ltd* case no 841/2004.

³³⁰ *Capricorn Makelaars BPK v EB Shelf Investment Pty Ltd* case no 841/2004 para 10.

³³¹ *Capricorn Makelaars BPK v EB Shelf Investment Pty Ltd* case no 841/2004 para 10.

³³² *Capricorn Makelaars BPK v EB Shelf Investment Pty Ltd* case no 841/2004 para 10.

³³³ *Capricorn Makelaars BPK v EB Shelf Investment Pty Ltd* case no 841/2004 para 10.

³³⁴ *Capricorn Makelaars BPK v EB Shelf Investment Pty Ltd* case no 841/2004 para 11.

In the case before court, it found that the Defendants proved that they were entitled to discovery.³³⁵ Van Dorsten argues that the Uniform Rules of Court are not yet abreast with the advancing technology in this regard.³³⁶

The Constitutional Court in *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services (Freedom of Expression Institute as Amicus Curiae) In re: Masetlha v President of the Republic of South Africa and Another*³³⁷ was asked to compel a party to discover.³³⁸ The Applicant asked for disclosure of the record of the court for a matter relating to *Masetlha* that had already been concluded.³³⁹ *Masetlha* was a head and Director General of the National Intelligence Agency, suspended by the then President and subsequently dismissed.³⁴⁰ He challenged the suspension as unlawful³⁴¹ and irregular.³⁴² Further, he asked that part of the proceeding should be conducted in-camera³⁴³ because the information shared in the affidavits was considered classified.³⁴⁴ *Masetlha* argued that the in-camera proceeding would protect state security.³⁴⁵ It was argued that some of the information contained in the record was held in-camera and confidential³⁴⁶ because it related to state security and therefore was classified information.³⁴⁷

³³⁵ *Capricorn Makelaars BPK v EB Shelf Investment Pty Ltd* case no 841/2004 para 12. The court held: '...The defendants say that disclosure of the invoices will provide a substantial advantage to them in pleading in that the disclosure will enable them to determine not only whether the goods in their possession are the same goods the plaintiffs claim as theirs, but also whether the age and costs of the goods likely to be revealed by the invoices justify the value claimed for them by the plaintiffs. It is difficult to see what particular disadvantage the plaintiffs may suffer by disclosing the invoices. If it assists in establishing the truth of their claims earlier than at the trial they would obviously have benefitted from the early discovery...'

³³⁶ Van Dorsten J 'Discovery of electronic documents and attorneys' obligations 2012 *De Rebus* 34.

³³⁷ 2008 (5) SA 31 (CC).

³³⁸ *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services (Freedom of Expression Institute as Amicus Curiae) In re: Masetlha v President of the Republic of South Africa and Another* 2008 (5) SA 31 (CC) [Herein after referred to as *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services*].

³³⁹ The case which the applicant sought record for *Masetlha v President of the Republic of South Africa and Another* 2008 (1) SA 66 (CC), which the court had finalised.

³⁴⁰ *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services* para 1-19.

³⁴¹ *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services* para 1-19.

³⁴² *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services* para 1-19.

³⁴³ *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services* para 1-19.

³⁴⁴ *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services* para 1-19.

³⁴⁵ *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services* para 1-19.

³⁴⁶ *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services* para 1-19.

³⁴⁷ *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services*.

There was also information that related to Operation Avani³⁴⁸ and details of counter intelligence reports³⁴⁹ hence it was submitted that the information was classified and confidential information.³⁵⁰

In determining the matter, the Constitutional Court considered section 32 of the Promotion to Access to Information Act 2 of 2000³⁵¹ and held that this section creates a presumption of the right to discovery.³⁵² PAJA was considered in this case because some of the paragraphs in the affidavits referred to Cabinet proceedings,³⁵³ which are considered immune in terms of section 12 of PAJA,³⁵⁴ which precludes parties from disclosing the latter.³⁵⁵ These Cabinet proceedings therefore could not be disclosed.³⁵⁶ The court indicated that discovery in civil litigation affords a party access to information.³⁵⁷ The Constitutional Court referred to Rules 29 and 35(13) of the Uniform Rules of Court respectively.³⁵⁸ The court found that discovery is an integral part of a fair civil trial.³⁵⁹ The Constitutional Court concluded:

“...Whether or not a document classified “confidential” has been disclosed to some degree in the public domain is a relevant but not decisive factor in determining whether the document deserves continued protection. This is so because a leaked confidential document does not lose its classification. If it were so, people may be encouraged to reap the benefit of their own misconduct by leaking classified or protected documents and thereby rendering the documents beyond the protection they may deserve. However, the fact that the contents of the document has been referred to in public is not alone sufficient reason to order that the entire document should be accessible to the public...”³⁶⁰

The court accordingly dismissed the application to compel discovery.³⁶¹

³⁴⁸ *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services* para 61.

³⁴⁹ *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services* para 61.

³⁵⁰ *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services* para 61.

³⁵¹ Section 32 of the Promotion of Access to Information Act states:

(a) Any information held by the state; and

(b) Any information that is held by another person and that is required for the exercise or protection of any rights...

³⁵² *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services* para 23.

³⁵³ *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services* para 63.

³⁵⁴ *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services* para 63.

³⁵⁵ *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services* para 63.

³⁵⁶ *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services* para 63.

³⁵⁷ *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services* para 26.

³⁵⁸ *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services* para 26.

³⁵⁹ *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services* para 26.

³⁶⁰ *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services* para 72.

³⁶¹ *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services* para 74.

In *Replication Technology Group and Others v Gallo Africa Limited In re: Gallo Africa Limited v Replication Technology Group and Others*³⁶² application was instituted to interdict discovery of certain documents.³⁶³

The Respondents became aware of the information during arbitration proceedings.³⁶⁴ The Applicant asked the court to prevent the Respondent from disclosing such information.³⁶⁵ The court considered the meaning of discovery and declared it a process enabling a party to access information relevant to the matter before court.³⁶⁶ The court indicated that it is significant to disclose information in full in civil litigation.³⁶⁷ The court indicated that a balance should be struck between protection of privacy, on the one hand, and public interest on the other, to determine whether there is a need to discover.³⁶⁸

The court held that discovery might be viewed as hindering the right to privacy³⁶⁹ in circumstances when parties are asked to disclose information relating to their thoughts.³⁷⁰ Furthermore, the court held that there is an infringement to privacy when parties must discover information that is embarrassing and scandalous.³⁷¹

³⁶² 2009 (5) SA 531 (GSJ).

³⁶³ *Replication Technology Group and Others v Gallo Africa Limited In re: Gallo Africa Limited v Replication Technology Group and Others* 2009 (5) SA 531 (GSJ) para 1.

³⁶⁴ *Replication Technology Group and Others v Gallo Africa Limited In re: Gallo Africa Limited v Replication Technology Group and Others* 2009 (5) SA 531 (GSJ) para 1.

³⁶⁵ *Replication Technology Group and Others v Gallo Africa Limited In re: Gallo Africa Limited v Replication Technology Group and Others* 2009 (5) SA 531 (GSJ) para 1.

³⁶⁶ *Replication Technology Group and Others v Gallo Africa Limited In re: Gallo Africa Limited v Replication Technology Group and Others* 2009 (5) SA 531 (GSJ) para 5.

³⁶⁷ *Replication Technology Group and Others v Gallo Africa Limited In re: Gallo Africa Limited v Replication Technology Group and Others* 2009 (5) SA 531 (GSJ) para 5.

³⁶⁸ *Replication Technology Group and Others v Gallo Africa Limited In re: Gallo Africa Limited v Replication Technology Group and Others* 2009 (5) SA 531 (GSJ) para 7.

³⁶⁹ *Replication Technology Group and Others v Gallo Africa Limited In re: Gallo Africa Limited v Replication Technology Group and Others* 2009 (5) SA 531 (GSJ) para 8. The court went on ... 'The rationale for the imposition of the implied undertaking is the protection of privacy. Discovery is an invasion of the individual right to keep his own documents to himself. It is a matter of public interest to safeguard that right. The purpose of the undertaking has been to protect, as far as is consistent with the proper conduct of the action, confidentiality of a party's document...'

³⁷⁰ *Replication Technology Group and Others v Gallo Africa Limited In re: Gallo Africa Limited v Replication Technology Group and Others* 2009 (5) SA 531 (GSJ) para 11.

³⁷¹ *Replication Technology Group and Others v Gallo Africa Limited In re: Gallo Africa Limited v Replication Technology Group and Others* 2009 (5) SA 531 (GSJ) para 11.

It appears that there is a need to incorporate express provision for electronic, digital, and e-technology discovery, as is the case in England, United States of America, and Canada. A proposed draft amendment is provided in chapter 5.

There are other rules that require parties to give notice before trial, for example, the medical examination process requires notice be given.³⁷² The same applies to notice of pre-trial conference.³⁷³ Subpoenas are also affected by issuing notice.³⁷⁴

The manner in which notices ought to be affected is not expressly provided³⁷⁵ and there is no reference to e-technology in effecting and delivery of notices,³⁷⁶ as is the case in the Constitutional Court Rules. It is submitted that the High Court should embrace e-technology, and digital and electronic means of effecting and delivering necessary notices. It is therefore necessary to amend these rules to ensure that they are in-line with the recent e-technology law.

In *Motata v Nair* the High Court had to decide whether it was correct to admit video clip recordings.³⁷⁷ There were arguments raised on the authenticity of the recordings and whether such video-clips could be used in criminal proceedings.³⁷⁸

It was argued that the camera used to record the clips was a digital recording camera and the video footage was stored in a memory card of a cell phone.³⁷⁹ The recordings were downloaded on a laptop.³⁸⁰ During trial, the cell phone and the memory card were missing³⁸¹ and it was argued that this resulted in reasonable suspicion that the recordings might have been manipulated.³⁸²

³⁷² Rule 36 of the Uniform Rules of Court.

³⁷³ Rule 37 of the Uniform Rules of Court.

³⁷⁴ Rule 38 of the Uniform Rules of Court deals with the manner of procuring evidence in court.

³⁷⁵ Rules 36 to 38 of the Uniform Rules of Court.

³⁷⁶ Rules 36 to 38 of the Uniform Rules of Court.

³⁷⁷ *Motata v Nair No and Another* 2008 ZAFSHC 53.

³⁷⁸ *Motata v Nair No and Another* 2008 ZAFSHC 53.

³⁷⁹ *Motata v Nair No and Another* 2008 ZAFSHC 53 para 1 - 4.

³⁸⁰ *Motata v Nair No and Another* 2008 ZAFSHC 53 para 4 - 14.

³⁸¹ *Motata v Nair No and Another* 2008 ZAFSHC 53 para 14.

³⁸² *Motata v Nair No and Another* 2008 ZAFSHC 53 para 14.

It was further argued that this could not be linked with authenticity;³⁸³ the recordings ought to be admitted as evidence based on expert evidence.³⁸⁴ The court however disagreed with this contention and instead professed:

“...It is necessary first to deal with the submission that the authenticity of the recordings is not an issue to be determined at this stage of the proceedings. We have considerable difficulty in grasping the basis upon which it is suggested that the issue of the possible manipulation of the recordings is distinguishable from that of authenticity. If, after having been downloaded from the cell phone, the recordings were manipulated or tampered with they are, to that extent, no longer authentic copies of the original video-clips. The issue of the possible manipulation of the recordings goes, in our view, straight to the heart of the issue of authenticity and cannot be divorced therefrom as applicant seeks to do...”³⁸⁵

Although this case relates to criminal proceedings, it is important because it deals with issues at the heart of this thesis: recognition of digitally produced evidence.³⁸⁶ The High Court held that it would intervene in the use of the video footage when there is evidence that such videos were tampered with.³⁸⁷ Cassim and Nieman support the notion of admitting videos as electronic evidence. In fact, they opine that video amounts to data and therefore falls within the definition of electronic communication and data messages. They agree that videos must be authentic to be admissible as electronic evidence. The researcher concurs with the assertions of these scholars, as well as the decision of the court in *Motata*. It is submitted that the party who alleges that the video recording is not authentic must prove this fact by leading expert evidence to rebut its authenticity. The court held:

“In all the circumstances we are of the view that nothing has been put before us to show that any grave injustice or failure of justice is likely to ensue if the recordings are played in court in the course of the trial-within-a-trial. That being the case there are no grounds upon which this Court may intervene at this stage of the proceedings in the court below.”³⁸⁸

The decision denotes that video footage, which was the essence of the dispute in this case, falls within the ambit of the use of digital e-technology.

³⁸³ *Motata v Nair No and Another* 2008 ZAFSHC 53 para 14.

³⁸⁴ *Motata v Nair No and Another* 2008 ZAFSHC 53 para 14.

³⁸⁵ *Motata v Nair No and Another* 2008 ZAFSHC 53 para 15.

³⁸⁶ *Motata v Nair No and Another* 2008 ZAFSHC 53 para 1 - 4.

³⁸⁷ *Motata v Nair No and Another* 2008 ZAFSHC 53 para 43 - 44.

³⁸⁸ *Motata v Nair No and Another* 2008 ZAFSHC 53 para 43.

This means that courts must admit digitally produced evidence and this infers that when parties discover in civil proceedings, digitally produced evidence will be accepted and admitted as such in the proceedings. The ECTA recognises the use of data produced through digital e-technology.³⁸⁹ Duvenhage³⁹⁰ and Cassim³⁹¹ interpret section 15 of the ECTA and profess that the section creates a rebuttable presumption and electronic evidence is admissible; unless the contrary is proved.³⁹² This means that Rule 35 of the Uniform Rules of Court must be amended to ensure that the meaning of electronic discovery includes digitally produced evidence.

Collier construes section 15 of the ECTA and states that it requires rebuttable proof of facts contained in record, printout, or extract to be admissible in proceedings.³⁹³ She further argues that section 15 of the ECTA places an obligation on courts to attach evidential value to data messages. Colliers says the intention of the legislature in section 15 of the ECTA leaves much to be desired because this section is not entirely clear.³⁹⁴

³⁸⁹ The ECTA.

³⁹⁰ Duvenhage A *An Evidential Analysis of section 15(4) of the Electronic Communications and Transactions Act of 2002*, (LLM University of Pretoria 2016).

³⁹¹ Cassim 2017 *Journal for Juridical Science* 26 -28.

³⁹² Duvenhage *An Evidential Analysis* 26 -28. It is suggested that rules must be modified to cater for electronic or digital discovery and an amended will be provided in the last chapter. Section 15 of the ECTA states:

- (1) In any legal proceedings, the rules of evidence must not be applied so as to deny the admissibility of a data message, in evidence-
 - a. on the mere grounds that it is constituted by a data message; or
 - b. if it is the best evidence that the person adducing it could reasonably be expected to obtain, on the grounds that it is not in its original form.
- (2) Information in the form of a data message must be given due evidential weight.
- (3) In assessing the evidential weight of a data message, regard must be had to -
 - a. the reliability of the manner in which the data message was generated, stored or communicated;
 - b. the reliability of the manner in which the integrity of the data message was maintained;
 - c. the manner in which its originator was identified; and
 - d. any other relevant factor.
- (4) A data message made by a person in the ordinary course of business, or a copy or printout of or an extract from such data message certified to be correct by an officer in the service of such person, is on its mere production in any civil, criminal, administrative or disciplinary proceedings under any law, the rules of a self-regulatory organisation or any other law or the common law, admissible in evidence against any person and rebuttable proof of the facts contained in such record, copy, printout or extract...

³⁹³ Collier 2005 *Juta's Bus.L Heinonline* 6 - 9.

³⁹⁴ Collier 2005 *Juta's Bus.L Heinonline* 6 - 9.

Papadopoulos and Snail indicate that Rule 37 of the Uniform Rules of Court requires amendment.³⁹⁵ Rule 37 provides for pre-trial conference.³⁹⁶ This narrows down the issues in dispute³⁹⁷ and eliminates irrelevant evidence.³⁹⁸ According to Rule 37(7) this must occur before trial commences.³⁹⁹ This Rule includes electronic evidence.⁴⁰⁰ Rule 37(6) obliges parties to prepare and sign the minutes of the pre-trial meeting, this rule should be amended to allow for electronic signature of the minutes.⁴⁰¹ According to Rule 37(7) the minutes of the pre-trial must be filed at court.⁴⁰² Filing is done with the Registrar but the manner of filing is not articulated nor the recognition of electronic filing.⁴⁰³ This creates a conflict between the ECTA and the court rules, which requires amendment.

Rule 38 provides a process for calling witnesses to testify in court proceedings and when necessary to produce documents as evidence.⁴⁰⁴ This, according to Rule 38 and common law, is referred to as subpoenas or subpoenas *duces tecum*.⁴⁰⁵ This Rule also provide for another manner of gathering or collecting evidence relevant to the court through commissioners⁴⁰⁶ or interrogatories.⁴⁰⁷ In terms of Rule 38, witnesses subpoenaed must testify and be cross-examined or re-examined.⁴⁰⁸

³⁹⁵ Papadopoulos and Snail *The law of the internet in South Africa* 329.

³⁹⁶ Rule 37 of the Uniform Rules of Court.

³⁹⁷ Rule 37 of the Uniform Rules of Court.

³⁹⁸ Rule 37 of the Uniform Rules of Court.

³⁹⁹ Rule 37 of the Uniform Rules of Court.

⁴⁰⁰ Papadopoulos and Snail *The law of the internet in South Africa* 329. Rule 37 of the Uniform Rules of Court provides for a pre-trial conference. This is a process where parties meet and agree and narrow down issue of disputes.

⁴⁰¹ Rule 37(6) of the Uniform Rules of Court.

⁴⁰² Rule 37(7) of the Uniform Rules of Court.

⁴⁰³ Rule 37(7) of the Uniform Rules of Court.

⁴⁰⁴ Rule 38 of the Uniform Rules of Court Rule 38 states:

‘...(1) (a) Any party, desiring the attendance of any person to give evidence at a trial, may as of right, without any prior proceeding whatsoever, sue out from the office of the registrar one or more subpoenas for that purpose, each of which subpoenas shall contain the names of not more than four persons, and service thereof upon any person therein named shall be effected by the sheriff in the manner prescribed by rule 4, and the process for subpoenaing such witnesses shall be, as nearly as may be, in accordance with Form 16 in the First Schedule.

If any witness has in his possession or control any deed, instrument, writing or thing which the party requiring his attendance desires to be produced in evidence, the subpoena shall specify such document or thing and require him to produce it to the court at the trial...’

⁴⁰⁵ Rule 38(1) of the Uniform Rules of Court and Pete *et al Civil Procedure* 704.

⁴⁰⁶ Rule 38(3) and (4) of the Uniform Rules of Court. Rule 38(4) states:

‘...Where the evidence of any person is to be taken on commission before any commissioner within the Republic, such person may be subpoenaed to appear before such commissioner to give evidence as if at the trial...’

⁴⁰⁷ Rule 38(5) of the Uniform Rules of Court.

⁴⁰⁸ Rule 38(2) of the Uniform Rules of Court.

It is however observed that the Rule does not embrace the use of e-technology. E-technology has advanced to the extent that it facilitates video or digital teleconferences. These can be used instead of expecting witnesses to physically appear in court. It is argued that witnesses may be cross- or re-examined through digital video recordings and CCTV.

In *PFE International Inc. and others v Industrial Development Corporation of South Africa Limited*,⁴⁰⁹ the Constitutional Court considered the significance of compliance with Rule 38 of the Uniform Rules of Court. There was a request made to discover information relating to records regarded as crucial to the civil proceeding.⁴¹⁰ The Supreme Court of Appeal first considered this case before it came before the Constitutional Court.⁴¹¹ The Supreme Court of appeal analysed and interpreted Rule 38:

“...In terms of this rule, the production of a document by a witness is obtained by the issuing of a subpoena *duces tecum*. It must be borne in mind that rule 38(1) is contemplated by s 30 of the Supreme Court Act 59 of 1959, which provides that a party to civil proceedings ‘may procure the attendance of any witness or the production of any document or thing in the manner provided for in the rules of court...’⁴¹²

The Constitutional Court went further than the Supreme Court of Appeal, in that it found that when witnesses are served with subpoena *duces tecum*, the content of the subpoenas *duces tecum* must have full details of the document that must be produced by a witness in the court proceeding.⁴¹³ The Constitutional Court further stated:

“...If read literally, the text of the Rule suggests that the purpose of issuing a subpoena *duces tecum* can be employed only in circumstances where attendance of a witness is sought for the purpose of testifying at a trial. And such “witness has in his possession or control any deed, instrument, writing or thing which the party requiring his attendance desires to be produced in evidence, the subpoena shall specify such document or thing and require him to produce it to the court at the trial”. The subrule goes on to state that any witness who is required to produce tangible evidence of the types listed above, must hand it over to the registrar as

⁴⁰⁹ *PFE International Inc. and others v Industrial Development Corporation of South Africa Limited* 2012 ZACC 21.

⁴¹⁰ *PFE International Inc. and others v Industrial Development Corporation of South Africa Limited* 2012 ZACC 21 para 12.

⁴¹¹ *Industrial Development Corporation of South Africa Ltd v PFE International Inc (BVI)* (910/10) [2011] ZASCA 245 para 1- 11.

⁴¹² *Industrial Development Corporation of South Africa Ltd v PFE International Inc (BVI)* (910/10) [2011] ZASCA 245 para 11.

⁴¹³ *PFE International Inc. and others v Industrial Development Corporation of South Africa Limited* 2012 ZACC 21 para 23.

soon as possible, unless the witness claims that evidence in question is privilege. Once it is given to the registrar the parties are entitled to inspect it and make copies...⁴¹⁴

This case is discussed because it illustrates the significance and application of Rule 38 in practice. As much as the Supreme Court of Appeal and the Constitutional Court interpreted the Rule, it is observed that there is no reference to the recognition of e-technology, or digital video recording, which can be utilised to effectively implement the rule in civil proceedings.⁴¹⁵ It is argued that the use of e-technology devices will save money currently used to secure witness attendance at court.

In *Meyers v Marcus and Another*⁴¹⁶ an application to set aside a subpoena was brought before court.⁴¹⁷ The parties were involved in a divorce matter and had been married out of community of property.⁴¹⁸ The Respondent was asked to bring financial statements thought to be relevant to the proceedings.⁴¹⁹ The court considered the decision in *Beinash v Wixley*,⁴²⁰ where it was held that subpoenas and subpoena *duces tecum* would be set aside when there is evidence that confirms an abuse of process.⁴²¹ The court referred to *Beinash* because it suspected abuse of process in the *Meyers* case.⁴²² The court interpreted Rule 38 and found that subpoena *duces tecum* must have a legitimate purpose.⁴²³

Further, the court alluded to the fact that subpoenas and subpoena *duces tecums* are important in litigation and courts will not readily interfere⁴²⁴ unless there is a need to protect the document in question.⁴²⁵ However, in the present case the court was not satisfied that there were enough reasons presented to convince the court that the document was relevant to financial position,⁴²⁶

⁴¹⁴ *PFE International Inc. and others v Industrial Development Corporation of South Africa Limited* 2012 ZACC 21 para 23.

⁴¹⁵ *PFE International Inc. and others v Industrial Development Corporation of South Africa Limited* 2012 ZACC 21 para 29.

⁴¹⁶ 2004 ZAWCHC 15.

⁴¹⁷ *Meyer v Marcus* 2004 ZAWCHC 15 para 1-7.

⁴¹⁸ *Meyer v Marcus* 2004 ZAWCHC 15 para 1-7.

⁴¹⁹ *Meyer v Marcus* 2004 ZAWCHC 15 para 1-7.

⁴²⁰ *Beinash v Wixley* 1997 ZASCA 31 and *Meyer v Marcus* 2004 ZAWCHC 15 para 21- 25.

⁴²¹ *Meyer v Marcus* 2004 ZAWCHC 15 para 23 - 24.

⁴²² *Meyer v Marcus* 2004 ZAWCHC 15 para 21- 25.

⁴²³ *Meyer v Marcus* 2004 ZAWCHC 15 para 23 - 24.

⁴²⁴ *Meyer v Marcus* 2004 ZAWCHC 15 para 26-36.

⁴²⁵ *Meyer v Marcus* 2004 ZAWCHC 15 para 26-34.

⁴²⁶ *Meyer v Marcus* 2004 ZAWCHC 15 para 37.

as well as confidential information that Meyers was going to use in the proceedings.⁴²⁷ The court stated that there was no merit to issue the subpoena in question.⁴²⁸ In addition, the court held that the subpoena *duces tecum* infringed on the right to privacy.⁴²⁹ This, according to the court was because Meyers was not involved in the pending litigation,⁴³⁰ and if the court had allowed the subpoena, it would amount to an infringement of his right to privacy,⁴³¹ because the court was of the view that the infringement *in casu* was not justifiable.⁴³² The court averred that the party who asks for a subpoena must prove the infringement justified and this was not the case under the circumstances.⁴³³ In fact, the subpoena *duces tecum* was misguided.⁴³⁴ Furthermore, the court held that the subpoena in question was high-handed and amounted to an abuse of process because it had not been proved that the documents were needed for litigation.⁴³⁵ The subpoena was only brought to court to preclude “a slow leak of document”.⁴³⁶

In *Parson and Another v Viljoen*⁴³⁷ the court was asked to set aside a subpoena *duces tecum*.⁴³⁸ The court interpreted Rule 38 of the Uniform Rules of Court and averred that the latter is mandatory for those asked to comply with it.⁴³⁹ The court looked at the main aim of the Rule and indicated that it seeks to secure documents.⁴⁴⁰ These documents are necessary to civil proceedings and should be submitted to the Registrar in this case.⁴⁴¹ The court held that the subpoena *duces tecum* did not amount to harassment⁴⁴² because the document sought to be produced was not sufficiently described.⁴⁴³

⁴²⁷ *Meyer v Marcus* 2004 ZAWCHC 15 para 26-34.

⁴²⁸ *Meyer v Marcus* 2004 ZAWCHC 15 para 23-34.

⁴²⁹ *Meyer v Marcus* 2004 ZAWCHC 15 para 68-69.

⁴³⁰ *Meyer v Marcus* 2004 ZAWCHC 15 para 50.

⁴³¹ *Meyer v Marcus* 2004 ZAWCHC 15 para 68.

⁴³² *Meyer v Marcus* 2004 ZAWCHC 15 para 68.

⁴³³ *Meyer v Marcus* 2004 ZAWCHC 15 para 68 - 69.

⁴³⁴ *Meyer v Marcus* 2004 ZAWCHC 15 para 69.

⁴³⁵ *Meyer v Marcus* 2004 ZAWCHC 15 para 69.

⁴³⁶ *Meyer v Marcus* 2004 ZAWCHC 15 para 46 - 69.

⁴³⁷ *Parsons and Another v Viljoen* 2011 ZAGPPHC 153.

⁴³⁸ *Parsons and Another v Viljoen* 2011 ZAGPPHC 153 para 2 - 3.

⁴³⁹ *Parsons and Another v Viljoen* 2011 ZAGPPHC 153 para 2 - 3.

⁴⁴⁰ *Parsons and Another v Viljoen* 2011 ZAGPPHC 153 para 2 - 3.

⁴⁴⁰ *Parsons and Another v Viljoen* 2011 ZAGPPHC 153 para 2 - 3.

⁴⁴¹ *Parsons and Another v Viljoen* 2011 ZAGPPHC 153 para 2 - 3.

⁴⁴² *Parsons and Another v Viljoen* 2011 ZAGPPHC 153 para 7.

⁴⁴³ *Parsons and Another v Viljoen* 2011 ZAGPPHC 153 para 7.

The Appellant however could have asked the Respondent to articulate the description of the document before trial.⁴⁴⁴ This according to the court could have been done before the hearing⁴⁴⁵ because the parties had enough time to do so; the subpoena was served 10 days before the trial.⁴⁴⁶ This is why the court was of the view that this did not amount to harassment.⁴⁴⁷ In this case, the court refused to set aside the subpoena because it was not well articulated.⁴⁴⁸

Recently, the Supreme Court of Zimbabwe considered a matter that related to subpoena *duces tecum*.⁴⁴⁹ The Supreme Court was asked to set the subpoena aside because it was alleged that it was not clear and was incompetent. It was argued that the subpoena *duces tecum* infringed on the right to privacy.⁴⁵⁰ The court held that a party who believes that there are no grounds for producing a document to comply with the subpoena *duces tecum* is entitled to make an application to set it aside.⁴⁵¹ The court confirmed that there was a need to serve the subpoena *duces tecum* because the documents that ought to be produced were important for litigation.⁴⁵² In coming to its conclusion, the Supreme Court looked at the expense and time that would be spent in ensuring that the document was produced.⁴⁵³ The court held that “...*balance of convenience tilts in favour of the appellants being allowed to appeal...*”⁴⁵⁴

The Constitutional Court in *Minister of Police and another v Premier of the Western Cape*⁴⁵⁵ had to consider the validity of the decision of a commission of inquiry to issue subpoenas to the police.⁴⁵⁶ The main issue was to set aside the subpoenas but in considering this case, the court had to look at the decision of the Commission.⁴⁵⁷ The Constitutional Court held:

⁴⁴⁴ *Parsons and Another v Viljoen* 2011 ZAGPPHC 153 para 7.

⁴⁴⁵ *Parsons and Another v Viljoen* 2011 ZAGPPHC 153 para 7.

⁴⁴⁶ *Parsons and Another v Viljoen* 2011 ZAGPPHC 153 para 7.

⁴⁴⁷ *Parsons and Another v Viljoen* 2011 ZAGPPHC 153 para 7.

⁴⁴⁸ *Parsons and Another v Viljoen* 2011 ZAGPPHC 153 para 7 - 9.

⁴⁴⁹ *NetOne Cellular (Pvt) Ltd and another v Econet Wireless (Pvt) Ltd* 2017 ZWSC 36.

⁴⁵⁰ *NetOne Cellular (Pvt) Ltd and another v Econet Wireless (Pvt) Ltd* 2017 ZWSC 36.

⁴⁵¹ *NetOne Cellular (Pvt) Ltd and another v Econet Wireless (Pvt) Ltd* 2017 ZWSC 36.

⁴⁵² *NetOne Cellular (Pvt) Ltd and another v Econet Wireless (Pvt) Ltd* 2017 ZWSC 36.

⁴⁵³ *NetOne Cellular (Pvt) Ltd and another v Econet Wireless (Pvt) Ltd* 2017 ZWSC 36.

⁴⁵⁴ *NetOne Cellular (Pvt) Ltd and another v Econet Wireless (Pvt) Ltd* 2017 ZWSC 36.

⁴⁵⁵ *Minister of Police and another v Premier of the Western Cape* 2-13 ZACC 33 (CC).

⁴⁵⁶ *Minister of Police and another v Premier of the Western Cape* 2-13 ZACC 33 (CC).

⁴⁵⁷ *Minister of Police and another v Premier of the Western Cape* 2-13 ZACC 33 (CC).

“...A subpoena may not always demand physical presence but may be only to obtain specified documents or material to be produced by the subpoenaed witness *duces tecum*...”⁴⁵⁸

The above cases are discussed to show that, in as much as it is important to serve subpoenas and subpoena *duces tecum*, the court has discretion to set these aside when there is evidence confirming that there is an abuse of court process. Furthermore, the averments made by the Constitutional Court in the case of the *Minister of Police and another v Premier of the Western Cape* are appreciated and welcomed because they confirm that the witness does not necessarily have to be physically present to introduce the document in question. It appears that this might be the case where the use of digital and e-technology is under consideration.

There are scholars who concur with the approach followed by the courts that where necessary, subpoenas or subpoena *duces tecum* must be served.⁴⁵⁹ Snykers discusses subpoena *duces tecum* with reference to the case of *Beinash v Wixley*.⁴⁶⁰ According to Snykers the court in this case applied and interpreted Rule 38 of the Uniform Rules of Court.⁴⁶¹ Snykers professes that the court in *Beinash* looked at the evidence presented⁴⁶² and concluded that courts will find an abuse of court process,⁴⁶³ in instances where and when the description of the document required in terms of subpoena *duces tecum* is not sufficiently articulated.⁴⁶⁴

In *Beinash v Wixley*⁴⁶⁵ an application was brought asking whether the court of first instance was correct in setting aside the subpoena served on the Respondent.⁴⁶⁶ It was argued that the Respondent ought to have complied with the subpoena *duces tecum*.⁴⁶⁷

⁴⁵⁸ *Minister of Police and another v Premier of the Western Cape* 2-13 ZACC 33 (CC) para 54.

⁴⁵⁹ Nel S 'Online defamation: the problem of unmasking online critics' 2007 *XL CILSA* 193 – 214 and Watney 2012 *TSAR* 320 – 330.

⁴⁶⁰ *Beinash v Wixley* 1997 (3) SA 721 SCA and Snykers F 'Civil and Constitutional Jurisdiction and Procedure' 1997 *Annual Survey of SA Law* 693 – 694.

⁴⁶¹ Snykers 1997 *Annual Survey of SA Law* 693 – 694.

⁴⁶² Snykers 1997 *Annual Survey of SA Law* 693 – 694.

⁴⁶³ Snykers 1997 *Annual Survey of SA Law* 693 – 694.

⁴⁶⁴ Snykers 1997 *Annual Survey of SA Law* 693 – 694.

⁴⁶⁵ 1997 (3) SA 721 SCA.

⁴⁶⁶ *Beinash v Wixley* 1997 (3) SA 721 SCA.

⁴⁶⁷ *Beinash v Wixley* 1997 (3) SA 721 SCA.

The Applicant submitted that the subpoena was not an abuse of the proceedings.⁴⁶⁸ The court disagreed and held that it had a right to protect parties from an abuse of process.⁴⁶⁹ The court found

“...an abuse of process takes place where the procedures permitted by the rules of the court to facilitate the pursuit of the truth are used for a purpose extraneous to that objective...”⁴⁷⁰

Each case ought to be considered on its merits to confirm the existence of abuse.⁴⁷¹ It was stated that where it is evident that the subpoena *duces tecum* is served maliciously and *mala fide*, the court would set it aside.⁴⁷² The court found that there must be a legitimate reason and it must not vague.⁴⁷³ The court concluded that there was no evidence presented to confirm that the court of first instance erred in setting aside the decision to force the Respondent to produce the documents sought by the Applicant.⁴⁷⁴

Nel argues that subpoena *duces tecum* may be served on third parties in issues relating to online defamation of character.⁴⁷⁵ The third party that Nel refers to is the internet service provider.⁴⁷⁶ Nel is of the view that before the service provider discloses the document required in terms of a subpoena *duces tecum*,⁴⁷⁷ the latter must consider privacy policies.⁴⁷⁸ Furthermore, there should be a limit insofar as the disclosure of information is concerned.⁴⁷⁹ Case law demonstrates that the party who seeks to serve subpoena *duces tecum* must illustrate the significance of the document to the proceedings.⁴⁸⁰ Nel concludes that there is a possibility that in online or internet cases,⁴⁸¹ subpoena *duces tecum* will be served on foreign service providers.⁴⁸²

⁴⁶⁸ *Beinash v Wixley* 1997 (3) SA 721 SCA.

⁴⁶⁹ *Beinash v Wixley* 1997 (3) SA 721 SCA.

⁴⁷⁰ *Beinash v Wixley* 1997 (3) SA 721 SCA para 30.

⁴⁷¹ *Beinash v Wixley* 1997 (3) SA 721 SCA.

⁴⁷² *Beinash v Wixley* 1997 (3) SA 721 SCA.

⁴⁷³ *Beinash v Wixley* 1997 (3) SA 721 SCA.

⁴⁷⁴ *Beinash v Wixley* 1997 (3) SA 721 SCA.

⁴⁷⁵ Nel 2007 XL CILSA 193 – 214.

⁴⁷⁶ Nel 2007 XL CILSA 193 – 214.

⁴⁷⁷ Nel 2007 XL CILSA 193 – 214.

⁴⁷⁸ Nel 2007 XL CILSA 193 – 214.

⁴⁷⁹ Nel 2007 XL CILSA 193 – 214.

⁴⁸⁰ Nel 2007 XL CILSA 193 – 214.

⁴⁸¹ Nel 2007 XL CILSA 193 – 214.

⁴⁸² Nel 2007 XL CILSA 193 – 214.

Van der Merwe⁴⁸³ and Watney⁴⁸⁴ illustrate the importance of issuing subpoenas and subpoena *duces tecums* from a criminal law perspective.⁴⁸⁵ Van der Merwe argues that when police are served with subpoenas,⁴⁸⁶ the other party to the proceedings may interview such officer.⁴⁸⁷ Furthermore, a witness may be protected from producing documents when privilege is claimed⁴⁸⁸ and the court will protect such witness.⁴⁸⁹ D' Oliveira confirms that a party may claim privilege but the court has discretion whether to accept.⁴⁹⁰ Where a witness refuses to comply with the subpoena,⁴⁹¹ other witnesses may be called to identify the document described in the subpoena *duces tecum*.⁴⁹²

Watney confirms that subpoena *duces tecums* are necessary to ensure that evidence relevant to the proceeding is presented.⁴⁹³ According to Watney the document must be explored in detail in the subpoena *duces tecum*.⁴⁹⁴

Hoornstra and Liethen state that subpoenas are crucial in litigation and this process extends to labour matters.⁴⁹⁵ According to Hoornstra and Liethen, a witness may be subpoenaed if he/she refuses to voluntarily testify in the proceedings.⁴⁹⁶

Rule 39 deals with the processes that must be followed regarding the actual trial proceedings.⁴⁹⁷

⁴⁸³ Van der Merwe SW 'The interviewing of witnesses' 1971 *De Rebus* 221 -223.

⁴⁸⁴ Watney 2012 *TSAR* 320 – 330.

⁴⁸⁵ Van der Merwe 1971 *De Rebus* 221 -223 and Watney 2012 *TSAR* 320 – 330.

⁴⁸⁶ Van der Merwe 1971 *De Rebus* 221 -223.

⁴⁸⁷ Van der Merwe 1971 *De Rebus* 221 -223.

⁴⁸⁸ Van der Merwe 1971 *De Rebus* 221 -223.

⁴⁸⁹ Van der Merwe 1971 *De Rebus* 221 -223.

⁴⁹⁰ D' Oliveira J 'International co-operation in criminal matters: The South African contribution' 2003 *SACJ* 323 369.

⁴⁹¹ Van der Merwe 1971 *De Rebus* 221 -223.

⁴⁹² Van der Merwe 1971 *De Rebus* 221 -223.

⁴⁹³ Watney 2012 *TSAR* 320 – 330.

⁴⁹⁴ Watney 2012 *TSAR* 320 – 330.

⁴⁹⁵ Hoornstra and Liethen 2005 *The Wayne Law Review* 113.

⁴⁹⁶ Hoornstra and Liethen 2005 *The Wayne Law Review* 113.

⁴⁹⁷ Rule 39 of the Uniform Rules of Court.

The relevant provisions of rule 39 of the Uniform Rules of Court for this thesis are highlighted below:

- (5) Where the burden of proof is on the plaintiff, he or one advocate for the plaintiff may briefly outline the facts intended to be proved and the plaintiff may then proceed to the proof thereof.
- (6) At the close of the case for the plaintiff, the defendant may apply for absolution from the instance, in which event the defendant or one advocate on his behalf may address the court and the plaintiff or one advocate on his behalf may reply. The defendant or

-
- his advocate may thereupon reply on any matter arising out of the address of the plaintiff or his advocate.
- (7) If absolution from the instance is not applied for or has been refused and the defendant has not closed his case, the defendant or one advocate on his behalf may briefly outline the facts intended to be proved and the defendant may then proceed to the proof thereof.
- (8) Each witness shall, where a party is represented, be examined, cross-examined or re-examined as the case may be by only one (though not necessarily the same) advocate for such party.
- (9) If the burden of proof is on the defendant, he or his advocate shall have the same rights as those accorded to the plaintiff or his advocate by subrule (5).
- (10) Upon the cases on both sides being closed, the plaintiff or one or more of the advocates on his behalf may address the court and the defendant or one or more advocates on his behalf may do so, after which the plaintiff or one advocate only on his behalf may reply on any matter arising out of the address of the (14) After the defendant has called his evidence, the plaintiff shall have the right to call rebutting evidence on any issues in respect of which the onus was on the defendant: Provided that if the plaintiff shall have called evidence on any such issues before closing his case he shall not have the right to call any further evidence thereon.
- (15) Nothing in subrule (13) and (14) contained shall prevent the defendant from cross-examining any witness called at any stage by the plaintiff on any issue in dispute, and the plaintiff shall be entitled to re-examine such witness consequent upon such cross-examination without affecting the right given to him by subrule (14) to call evidence at a later stage on the issue on which such witness has been cross-examined. The plaintiff may further call the witness so re-examined to give evidence on any such issue at a later stage.
- (16) A record shall be made of-
- (a) any judgment or ruling given by the court,
- (b) any evidence given in court,
- (c) any objection made to any evidence received or tendered,
- (d) the proceedings of the court generally (including any inspection *in loco* and any matter demonstrated by any witness in court); and
- (e) any other portion of the proceedings which the court may specifically order to be recorded. defendant or his advocate.
- (17) Such record shall be kept by such means as to the court seems appropriate and may in particular be taken down in shorthand or be recorded by mechanical means
- (18) The shorthand notes so taken or any mechanical record shall be certified by the person taking the same to be correct and shall be filed with the registrar. It shall not be necessary to transcribe them unless the court or a judge so directs or a party appealing so requires. If and when transcribed, the transcript of such notes or record shall be certified as correct by the person transcribing them and the transcript, the shorthand notes and the mechanical record shall be filed with the registrar. The transcript of the shorthand notes or mechanical record certified as correct shall be deemed to be correct unless the court otherwise orders.
- (19) Any party to any matter in which a record has been made in shorthand or by mechanical means may apply in writing through the registrar to a judge to have the record transcribed if an order to that effect has not already been made. Such party shall be entitled to a copy of any transcript ordered to be made upon payment of the prescribed fees.
- (20) If it appears convenient to do so, the court may at any time make any order with regard to the conduct of the trial as to it seems meet, and thereby vary any procedure laid down by this rule.
- (21) Every stenographer employed to take down a record and every person employed to make a mechanical record of any proceedings shall be deemed to be an officer of the court and shall, before entering on his duties, take the following oath:
I, A.B., do swear that I shall faithfully, and to the best of my ability, record in shorthand, or cause to be recorded by mechanical means, as directed by the judge, the proceedings in any case in which I may be employed as an officer of the court, and that I shall similarly, when required to do so, transcribe the same or, as far as I am able,

For example, the party who has a burden to prove the case must start presenting his/her evidence during trial.⁴⁹⁸ Furthermore, witnesses testify and are cross-examined or re-examined.⁴⁹⁹ The proceedings are recorded by a stenographer⁵⁰⁰ and the record is made available after it is transcribed and certified.⁵⁰¹ The record is filed by the Registrar of the court.⁵⁰² The court is conferred with powers to make a decision after the hearing,⁵⁰³ for example, the court may grant an order of absolution from the instance where the party failed to prove his/her case.⁵⁰⁴

Rule 39 is silent concerning the use of digital and electronic manners of conducting proceedings during trial. It is suggested that, as part of the trial process, it would be advantageous, if courts could have digital video cameras recording the trial proceeding.

It is submitted that there should be a proviso in the Rule that allows the use of digital video camera, unless there is a request that the proceeding be conducted in-camera to enforce protection of the right to privacy. It is submitted that the court should get consent from the parties, or at least notify the parties, that the trial will be video recorded. Erasmus and Van Loggerenberg confirm that courts are open to the public but there are a few exceptions.⁵⁰⁵ For example, in cases where there are minors involved the proceedings will be conducted in-camera.⁵⁰⁶

Rule 45 deals with the execution of writs and requires personal execution.⁵⁰⁷ Alternatively, a sheriff should execute writs through notice.⁵⁰⁸

any shorthand notes, or mechanical record, made by another stenographer or person employed to make such mechanical record..."

498 Rule 39(5) of the Uniform Rules of Court.

499 Rule 39(8) of the Uniform Rules of Court.

500 Rule 39(21) of the Uniform Rules of Court.

501 Rule 39(18) of the Uniform Rules of Court.

502 Rule 39(18) of the Uniform Rules of Court.

503 Rule 39(16) of the Uniform Rules of Court.

504 Rule 39(6) and (7) of the Uniform Rules of Court.

505 Erasmus JH and Van Loggerenberg DE *Jones and Buckle: The Civil Practice of the Magistrates Courts In South Africa* 10th ed (Juta Cape Town 2017) 10 - 13.

506 Erasmus JH and Van Loggerenberg DE *Jones and Buckle: The Civil Practice of the Magistrates Courts In South Africa* 10th (Juta Cape Town 2017) 10 - 13. Erasmus and Van Loggerenberg state that in Traditional Courts: 'The court may in any case in the interest of good order or public morals, direct that civil trial shall be held with closed doors, or that with such exceptions as the court may direct minors or public generally shall not be permitted to present...'

507 Rule 45(3)(ii) of the Uniform Rules of Court.

508 Rule 45(3) (c) (ii) of the Uniform Rules of Court.

This rule also provides for the inventory process by sheriff.⁵⁰⁹ This Rule will be affected in future, as discussed in chapter 2, in that court orders will be executed electronically, or through use of digital or e-technology devices or instruments. The inventory may still be undertaken by sheriff but in future should be performed using digital recording to determine assets subject to inventory process instead of manually writing down assets, as it is currently the case.⁵¹⁰ It is submitted that the digital recording camera used during the inventory should also facilitate the use of advanced electronic signature after the sheriff has digitally recorded the assets.

Rule 62 deals with filing and preparation of documents.⁵¹¹ This rule requires that a copy be given to each judge in matters where there is more than one judge presiding.⁵¹² According to Papadopoulos and Snail, the process of making copies amounts to duplication.⁵¹³ The two scholars further submit that electronic copies save time.⁵¹⁴ This Rule should also cater for the use of computers or touch screen tablets by judges in proceedings to save paper used to compile bundles for judges in court. The amendment of the rules should result in the use of e-technology during proceedings and move away from the use of hard-copies. This could be used as an option for judges who prefer e-technology, thus, there should be express provisions in the Rules that cater for this.

5. Magistrates' Courts Rules

The processes in the Magistrates' Courts' Rules are the same as those contained in the Uniform Rules of Court.⁵¹⁵ The difference is that, in the magistrates' courts, the court official who issues summons and other processes is the clerk of the court.⁵¹⁶

⁵⁰⁹ Rule 45(3) (c)(ii) of the Uniform Rules of Court. An inventory is a process wherein the sheriff Appears in the property of the defendant and attach the movable properly to the value of the amount of the judgment or rental owed.

⁵¹⁰ Erasmus and Van Loggerenberg *Jones and Buckle: The Civil Practice of the Magistrates' Courts in South Africa* 117.

⁵¹¹ Rule 62 of the Uniform Rules of Court.

⁵¹² Rule 62 of the Uniform Rules of Court.

⁵¹³ Papadopoulos and Snail *The law of Internet in South Africa* 316, see the earlier discussion under rule 20 of the Constitutional Rules of Court.

⁵¹⁴ Papadopoulos and Snail *The law of Internet in South Africa* 316.

⁵¹⁵ Magistrates' Courts' Rules and Uniform Rules of Court.

⁵¹⁶ Rule 5 of the Magistrates' Courts' Rules.

For example, Rule 9 of the Magistrates' Court Rules provides the same manner of effecting service as contained in Rule 4 of the Uniform Rules of Court.⁵¹⁷

Before embarking on the discussion of the relevant rules, it is vital to note the definition of delivery as defined by the rules. In terms of the rules, delivery means filing and serving court documents to respective parties.⁵¹⁸ This calls for an amendment of the definition to incorporate e-technology use in the meaning of delivery.

According to Rule 2 notices served and filed in terms of the court proceedings, are construed to be *in writing*.⁵¹⁹ Once again, there is no alignment with section 12 of the ECTA as far as the meaning of *in writing* is concerned. This calls for a modification of the definition to incorporate section 12 of the ECTA.

As is the case in the High Court, when a party has a claim against a defendant, such party approaches the clerk to issue summons.⁵²⁰ In terms of the rules, the summons officially starts civil proceedings.⁵²¹ The clerk is obliged to sign the summons before issuing it.⁵²² Subsequently, the sheriff serves summons on the defendant.⁵²³ The sheriffs are also required to prove service by a return of service,⁵²⁴ meaning that the sheriff gives a report that confirms, the date,⁵²⁵ time and the manner⁵²⁶ in which service was effected.⁵²⁷

It is now important to discuss relevant rules that regulate the process that begins proceedings, which need to be modified in-line with e-technology law.

⁵¹⁷ Rule 2(b) of the Magistrates' Courts' Rules.

⁵¹⁸ Rule 2(b) of the Magistrates' Courts' Rules.

⁵¹⁹ Rule 2 of the Magistrates' Courts' Rules.

⁵²⁰ Rule 5 of the Magistrates' Courts' Rules.

⁵²¹ Rule 5 of the Magistrates' Courts' Rules.

⁵²² Rule 3 and 5 of the Magistrates' Courts' Rules.

⁵²³ Rule 8 of the Magistrates' Courts' Rules.

⁵²⁴ Rule 9(3)(g) of the Magistrates' Courts Rules. Rule 8(3) states:

'...The sheriff to whom process other than summonses is entrusted for service or execution shall in writing notify—

(a) the clerk of the court and the party who sued out the process that service or execution has been duly effected, stating the date and manner of service or the result of execution and return the said process to the clerk of the court; or

(b) the party who sued out the process that he has been unable to effect service or execution and of the reason for such inability, and return the said process to such party. The sheriff shall keep a record of any process so returned...'

⁵²⁵ *Pete et al Civil Procedure* 133.

⁵²⁶ *Pete et al Civil Procedure* 133.

⁵²⁷ *Pete et al Civil Procedure* 133.

The clerk of the court is conferred with powers and duties to ensure the smooth running of civil proceedings. According to Rule 3, the clerk of the court receives documents that are filed to the court and he/she is obliged to number these documents before they are filed in the court file.⁵²⁸ This includes summons issued to the defendant in terms of Rule 5.⁵²⁹ Rule 5 provides for the manner in which proceedings should be commenced.⁵³⁰ For example, the type of claim determines the type of summons that must be issued for civil proceedings.⁵³¹ This Rule necessitates that summons must be in printed format.⁵³² Amendments to Rule 5 via Government Gazette in 2014 do not accommodate effective use of e-technology in civil proceedings.⁵³³ The signature that is mandatory does not facilitate electronic signatures.⁵³⁴

The amendment in Rule 6 still requires personal service of court papers in divorce matters.⁵³⁵ The amendment mandates that papers are served by sheriff which does not promote the use of e-technology in divorce proceedings.⁵³⁶ According to Harms there are simple and combined summons.⁵³⁷ Simple summons are issued in respect of claims relating to a debt or liquidated demand,⁵³⁸ thus, the amount claimed must be fixed; certain and easily ascertained.⁵³⁹

⁵²⁸ Rule 3 of the Magistrates' Courts' Rules.

Rule 3 states:

'...1) The first document filed in a case or any application not relating to a then pending case shall be numbered by the clerk of the court with a consecutive number for the year during which it is filed.

[Sub-r. (1) substituted by GN R607 of 1989.]

(2) Every document afterwards served or delivered in such case or application or in any subsequent case in continuation of any such application shall be marked with such number by the party delivering it and shall not be received by the clerk of the court until so marked.

(3) All documents delivered to the clerk of the court to be filed of record and any minutes made by the court shall be filed of record under the number of the respective action or application.

(4) Copies of such records may be made by any person in the presence of the clerk of the court...'

⁵²⁹ Rule 3 and 5 of the Magistrates' Courts' Rules.

⁵³⁰ Rule 5 of the Magistrates' Courts' Rules.

⁵³¹ Harms D *Civil Procedure in Magistrates' Courts* Part C ed (LexisNexis Durban 2016) C- 22.

⁵³² Rule 5(3) of the Magistrates' Courts Rules. Rule 5(4) does to a certain extent recognize 'electronic or photographic copy of the type set original'. It is observed that this proviso is very vague it needs to be modified and articulated to accommodate ECTA provisions.

⁵³³ Government Gazette 27 June 2014 No 37769.

⁵³⁴ Rule 5(2) and 5 (3) of the amendments in the Government Gazette 27 June 2014 No 37769.

⁵³⁵ Rule 6 of the Government Gazette 27 June 2014 No 37769.

⁵³⁶ Rule 6 of the Government Gazette 27 June 2014 No 37769.

⁵³⁷ Harms *Civil Procedure in Magistrates' Courts* Part C 22.

⁵³⁸ Harms *Civil Procedure in Magistrates' Courts* Part C 22.

⁵³⁹ Pete et al *Civil Procedure* 179- 185 and 699.

Combined summons are issued for claims such as divorce proceedings,⁵⁴⁰ and these are issued together with particulars that set out the main cause of action.⁵⁴¹ Lastly, there are provisional sentence summons issued for claims relating to a liquid document such a cheque.⁵⁴² The clerk of the court issues all these summonses.⁵⁴³

The Rule places another obligation on that clerk by requiring him/her to sign such summons and all the other court papers filed to court.⁵⁴⁴ Christianson argues that Rule 1 of the Magistrates' Courts' Rules does to a certain extent incorporate the use of electronic signatures.⁵⁴⁵ It is observed that this is not enough; the courts must implement e-technology and digital devices that enable parties to use advanced electronic signature from the outset.

The lack of the recognition of e-technology in Rule 5 calls for an amendment of this Rule to accommodate section 13 of the ECTA and to insert the use of advanced electronic signature in court proceedings. It is noted that there is no provision in the Rule that accommodates electronic filing of documents.

⁵⁴⁰ Harms *Civil Procedure in Magistrates' Courts* Part C 22 and Pete et al *Civil Procedure* 179-185 and 699.

⁵⁴¹ Harms *Civil Procedure in Magistrates' Courts* Part C 22 and Pete et al *Civil Procedure* 179-185 and 699.

⁵⁴² Pete et al *Civil Procedure* 185 and 702.

⁵⁴³ Rule 5 of the Magistrates' Courts' Rules.

⁵⁴⁴ Rule 5(2) of the Magistrates' Courts' Rules.

⁵⁴⁵ Christianson 2012 *De Rebus* 69. Rule 1 states:

'...General.—(1) The provisions contained in rules 19, 21 and 23 to 26, inclusive of these rules shall be applicable only if—

(a) the plaintiff has not applied for summary judgment; or

(b) the plaintiff has applied for summary judgment and the application has been dismissed or an order has been made giving the defendant leave to defend.

(2) (a) With the exception of forms 2, 3, 5A and 5B which shall in all respects conform to the specimens, the forms contained in Annexure 1 may be used with such variation as circumstances require. Non-compliance with this rule shall not in itself be a ground for exception but at any court in which a machine has been installed for the purpose of facilitating the issue of summonses, the clerk of the court may refuse to issue any summons purporting to be in the form of form 2 or 3 but which does not comply with the prescribed requirements or to comply with a request contained in form 5A or 5B.

(b) All process of the court for service or execution and all documents or copies to be filed of record other than documents or copies filed of record as documentary proof shall be on paper known as A4 standard paper of a size of approximately 210 mm by 297 mm or on foolscap paper: Provided that after the expiration of a period of 12 months from the commencement of these rules such process or documents or copies other than documents or copies filed of record as documentary proof shall be on such A4 standard paper only.[Para. (b) amended by GN R3002 of 1969 and by GN R1115 of 1974.]

(c) Any process or notice or document issued or delivered shall be endorsed with the name and address of the party issuing or delivering it...

This part of the Rule must be amended in-line with advancing e-technology legislation. A draft of these proposed amendments is provided in chapter 5.

Rule 6 requires summons to be signed by the plaintiff⁵⁴⁶ or by his attorneys and there is no reference to the use of electronic signature.⁵⁴⁷ Jones and Buckle indicate that the contents of the Rule are mandatory as they place an obligation on attorneys to sign court papers before they are issued by the clerk of the court.⁵⁴⁸ This Rule should be amended to incorporate electronic signature. Rule 6(2) requires the defendant to submit particulars of the address wherein all the notices or documents will be delivered.⁵⁴⁹ This Rule should be amended to make possible the submission of electronic particulars as an alternative to the parties' address.

Rule 8 of the Magistrates' Courts' Rules indicates that service shall be conducted through the sheriff's office.⁵⁵⁰ Erasmus and Van Loggerenberg state that Rule 8 provides for the manner in which service should be affected and they confirm that in practice service is still conducted personally by the parties.⁵⁵¹ In *Lorac v Musa*⁵⁵² the court considered an execution of the judgments relating to compliance with insolvency law matters.⁵⁵³ It was contended that insolvency processes may not be effected, if personal service to the debtor is not complied with.⁵⁵⁴ The court disagreed and held:

"The failure of the returns of service to state *ex facie* on whom the writs were served and why they were not served on the debtor, on its own, would not be fatal."⁵⁵⁵

Erasmus and Van Loggerenberg refer to *Lorac* to demonstrate that legal representatives in practice still regard personal service as the key to ensure that the party concerned is indeed served.⁵⁵⁶

⁵⁴⁶ Rule 6 of the Magistrates' Courts' Rules.

⁵⁴⁷ Rule 6 of the Magistrates' Courts' Rules

⁵⁴⁸ Erasmus and Van Loggerenberg *Jones and Buckle: The Civil Practice of the Magistrates' Courts in South Africa* 13 – 15.

⁵⁴⁹ Rule 6(2) of the Magistrates' Courts' Rules.

⁵⁵⁰ Rule 8 of the Magistrates' Courts' Rules.

⁵⁵¹ Erasmus and Van Loggerenberg *Jones and Buckle: The Civil Practice of the Magistrates' Courts in South Africa* 12.

⁵⁵² *Lorac v Musa* 1991 (1) SA 152 ZH.

⁵⁵³ *Lorac v Musa* 1991 (1) SA 152 ZH.

⁵⁵⁴ *Lorac v Musa* 1991 (1) SA 152 ZH.

⁵⁵⁵ *Lorac v Musa* 1991 (1) SA 152 ZH.

⁵⁵⁶ Erasmus and Van Loggerenberg *Jones and Buckle: The Civil Practice of the Magistrates' Courts in South Africa* 12 2016.

Rule 8 stipulates that the sheriff must affect the magistrates' courts processes.⁵⁵⁷ It appears that when the courts use, or move towards using, digital e-technology, the sheriffs may not need to do this. The Rule should be changed to accommodate execution through e-technology as is the case in international jurisdictions discussed in chapter 4.

Rule 9 affirms that service of court documents is to be effected by the sheriff.⁵⁵⁸ This Rule also provides for service by post.⁵⁵⁹ According to Rule 9 service may also be effected personally or in the place of residence.⁵⁶⁰ Rule 9 also enables service at a place of business or place of employment.⁵⁶¹ This Rule is similar to Rule 4 of the Uniform Rules of Court.⁵⁶² It appears that the Rule must be amended to expressly provide for the use of e-technology.

The Rule also allows subpoenas to be served.⁵⁶³ When the defendant avoids being served, the documents may be affixed to the door of his/her place of residence.⁵⁶⁴ The sheriff may also affix the documents on the principal door or at the security gate of the residence.⁵⁶⁵ Rule 9 further provides for service of other documents by hand or by registered post.⁵⁶⁶ The Rule also enables parties to effect service by registered letter.⁵⁶⁷ There is no reference to electronic means of service, or use of other e-technology or digital means of service. This Rule should be amended in-line with Rule 4A of the Uniform Rules of Court and be modified in-line with ECTA. The same applies to Rule 13. Amendment to Rule 13 recognised the use of electronic e-mails⁵⁶⁸ but, it is argued, is insufficient in embracing e-technology.

⁵⁵⁷ Rule 8 of the Magistrates' Courts' Rules.

⁵⁵⁸ Rule 9 of the Magistrates' Courts' Rules.

⁵⁵⁹ Rule 9 of the Magistrates' Courts' Rules.

⁵⁶⁰ Rule 9 of the Magistrates' Courts' Rules.

⁵⁶¹ Rule 9(2) of the Magistrates' Courts' Rules.

Rule 9(3) (f) states: '...if the plaintiff or his authorised agent has given written instructions to the sheriff to serve by registered post, the process shall be so served...'

⁵⁶² Rule 4 of the Uniform Rules of Court.

⁵⁶³ Rule 9(10) of the Magistrates' Courts' Rules.

⁵⁶⁴ Rule 9(5) of the Magistrates' Courts' Rules.

⁵⁶⁵ Rule 9(5) of the Magistrates' Courts' Rules.

⁵⁶⁶ Rule 9(11) of the Magistrates' Courts' Rules.

⁵⁶⁷ Rule 9(15) of the Magistrates' Courts' Rules.

⁵⁶⁸ Rule 13(3) and 13(6) of the amendments provided in Government Gazette 27 June No 37769.

Pete *et al* indicate that the substituted service may be invoked in the Magistrates Courts when it is not possible to serve in terms of the Rules.⁵⁶⁹

Rule 23 of the Magistrates' Courts' Rules are similar to the principles set out in Rule 35 of the Uniform Rules of Court. Rule 23 requires parties to request discovery before trial to enable proper preparation.⁵⁷⁰

In *M v M*⁵⁷¹ application was brought before court in accordance with Rule 23 of the Magistrates' Courts' Rules.⁵⁷² The court was asked to force the Defendant to discover documents that were not pleadings after *litis contestatio*, in a divorce matter.⁵⁷³ The court emphasised the significance of discovery⁵⁷⁴ and held that the Plaintiff is entitled to the documents requested in order to ensure an equitable distribution of the joint estate.⁵⁷⁵

According to Jones and Buckle Rule 23 is critical in practice because parties must know the evidence that will be presented in the proceeding so that they can adequately prepare.⁵⁷⁶ This is achieved by asking the other party to discover evidence relevant to litigation.⁵⁷⁷

Pete *et al* argue that discovery is an important process invoked after *litis contestatio*.⁵⁷⁸ Pete *et al* aver that a party may not just inspect documents without issuing a notice to discover to the other party.⁵⁷⁹

⁵⁶⁹ Pete *et al* *Civil Procedure* 141.

⁵⁷⁰ Rule 23 of the Magistrates' Court's Rules.

Rule 23(1)(a) states: ...'Any party to any action may require any other party thereto, by notice in writing, make discovery on oath within 20 days of all documents and tape, electronic, digital or other forms of recordings relating to any matter in question in such action, whether such matter is one arising between the party requiring discovery and the party required to make discovery or not, which are or have at any time been in the possession or control of such party'.

⁵⁷¹ *M v M* 2014 ZAGP JHB 295.

⁵⁷² *M v M* 2014 ZAGP JHB 295 para 4.

⁵⁷³ *M v M* 2014 ZAGP JHB 295 para 1- 9.

⁵⁷⁴ *M v M* 2014 ZAGP JHB 295 para 1- 16.

⁵⁷⁵ *M v M* 2014 ZAGP JHB 295 para 1- 16.

⁵⁷⁶ Erasmus and Van Loggerenberg *Jones and Buckle: The Civil Practice of the Magistrates' Courts in South Africa* 15 .

⁵⁷⁷ Erasmus and Van Loggerenberg *Jones and Buckle The Civil Practice of the Magistrates' Courts in South Africa* 12.

⁵⁷⁸ Pete *et al* *Civil Procedure* 266 267.

⁵⁷⁹ Pete *et al* *Civil Procedure* 266.

These scholars narrow down the interpretation of tape recordings.⁵⁸⁰ They argue that compact disks, computer disks, computer hard-drives, video tapes, and photographs are included in the definition of tape recordings.⁵⁸¹

According to Van Dorsten, the application of this Rule in practice is important and electronically stored information ought to be disclosed during the civil proceedings.⁵⁸² Van Dorsten further argues there is a gap in the use of electronic discovery in Rule 23 of the Magistrates' Courts' Rules.⁵⁸³ Van Dorsten also refers to the lack of incorporation of electronic data in the meaning of document in accordance with the rules.⁵⁸⁴

Harms argues that the discovery process in civil litigation assists the plaintiff and the defendant to narrow down issues relevant to the proceeding.⁵⁸⁵ Furthermore, discovery provides an opportunity to settle after perusing the evidence discovered.⁵⁸⁶ Harms indicates that one of the disadvantages of discovery is that a witness to the proceeding may give false testimony.⁵⁸⁷ The court has discretion to allow for the discovery of documents relevant to trial.⁵⁸⁸ The court will set out certain exceptions to discovery in order to enforce the protection of the right to privacy of the concerned individuals or witnesses.⁵⁸⁹

When parties invoke and apply Rule 23 in practice, they are precluded from bringing an action in terms of the Promotion of Access to Information Act 2 of 2002.⁵⁹⁰ This is because a party can also obtain access to documents in terms of PAJA.⁵⁹¹ Harms argues that a party to the proceeding may not inspect documents.⁵⁹² If a party wants to inspect documents in terms of the Rules, he must first serve a notice to discover.⁵⁹³

⁵⁸⁰ Pete *et al Civil Procedure* 266 - 267.

⁵⁸¹ Pete *et al Civil Procedure* 267.

⁵⁸² Van Dorsten 2012 *De Rebus* 34.

⁵⁸³ Van Dorsten 2012 *De Rebus* 34.

⁵⁸⁴ Van Dorsten 2012 *De Rebus* 34.

⁵⁸⁵ Harms *Civil Procedure in Magistrates' Courts* B-199.

⁵⁸⁶ Harms *Civil Procedure in Magistrates' Courts* B-199.

⁵⁸⁷ Harms *Civil Procedure in Magistrates' Courts* B-199.

⁵⁸⁸ Harms *Civil Procedure in Magistrates' Courts* B-199.

⁵⁸⁹ Harms *Civil Procedure in Magistrates' Courts* B-199.

⁵⁹⁰ Harms *Civil Procedure in Magistrates' Courts* B-199.

⁵⁹¹ Harms *Civil Procedure in Magistrates' Courts* B-199.

⁵⁹² Harms *Civil Procedure in Magistrates' Courts* B-199 – B-200.

⁵⁹³ Rule 23(3) of the Magistrates' Courts Rules and Harms *Civil Procedure in Magistrates' Courts* B-199 – B-200.

Harms recognises the fact that Rule 23 of the Magistrates' Courts' Rules, to a certain extent, embraces e-technology during discovery⁵⁹⁴ by allowing parties to invoke electronic or digital discovery.

Rule 25 of the Magistrates Court also enables parties to call for a pre-trial conference.⁵⁹⁵ As in the High Court, the purpose of a pre-trial in the magistrates' courts is to enable parties to narrow down issues.⁵⁹⁶ Further, pre-trial conference in terms of section 54 of the Magistrates' Court Act allows parties to eliminate unnecessary evidence.⁵⁹⁷ Erasmus and Van Loggerenberg discuss pre-trial process with reference to section 54 of the Magistrates' Courts' Act.⁵⁹⁸ These scholars support this process, as they believe it assists parties to identify the way forward regarding the facts in dispute.⁵⁹⁹

Van Dorsten indicates that the court in *Le Roux and Others v Viana NO and others* correctly defined documents to include electronic information.⁶⁰⁰ In this case the court had to determine whether documents fell within the meaning of electronic communication.⁶⁰¹

⁵⁹⁴ Harms *Civil Procedure in Magistrates' Courts* B-199 – B-200 -205.

⁵⁹⁵ Harms *Civil Procedure in Magistrates' Courts* B-219.

⁵⁹⁶ Harms *Civil Procedure in Magistrates' Courts* B-219.

⁵⁹⁷ Section 54 of the Magistrates' Courts Act and Harms *Civil Procedure in Magistrates' Courts* B-219. Rule 25 states:

- (1) The request in writing referred to in section 54 (1) of the Act shall be made in duplicate to the clerk of the court requesting the court to call a pre-trial conference and shall indicate generally the matters which it is desired should be considered at such conference.
- (2) The clerk of the court shall forthwith place such request before a judicial officer who shall, if he decides to call a conference, direct the clerk of the court to issue the necessary process.
- (3) The process for requiring the attendance of parties or their legal representatives at a pre-trial conference shall be by letter signed by the clerk of the court, together with a copy of the request, if any, referred to in subrule (1). Such letter shall be delivered by hand or registered post at least 10 days prior to the date fixed for the said conference..'

⁵⁹⁸ Erasmus and Loggerenberg *Jones and Buckle: The Civil Practice of the Magistrates' Courts in South Africa* 220 –230.

⁵⁹⁹ Erasmus and Van Loggerenberg *Jones and Buckle: The Civil Practice of the Magistrates' Courts in South Africa* 220 – 230.

⁶⁰⁰ Van Dorsten 2012 *De Rebus* 34.

⁶⁰¹ *Le Roux and Others v Viana NO and others* 2008 (2) SA 173 SCA.

This case relates to the application of section 69(3) of the Insolvency Act 24 of 1936 but it narrows down the meaning of documents contained in a hard-drive.⁶⁰² The gist of the issue in this case was whether documents in a hard-drive could be seized.⁶⁰³

The court interpreted the meaning of documents and books and held that the information contained in the hard-drive was subject to seizure.⁶⁰⁴ The fact that such information was saved in the hard-drive, did not mean that same could not be disclosed for the purpose of litigation.⁶⁰⁵

In *Industrial Development Corporation of South Africa Ltd v PFE International Inc (BVI)*⁶⁰⁶ the court made a distinction between section 7 of the Promotion of Access to Information Act and discovery in accordance with civil procedure rules.⁶⁰⁷ The court held that interpretation of section 7⁶⁰⁸ shows that a party has a choice either to use section 7 of PAJA or Rule 23 of the Magistrates Court Rules to ask for information or documents.⁶⁰⁹ According to the court, the party however may not use both PAJA and Rule 23 at the same time to obtain documents for civil proceedings.⁶¹⁰

Further, the court found that the main purpose of section 7 is to avoid a conflict between discovery and its application.⁶¹¹ The court considered the intention of the legislature at the time it drafted PAJA.⁶¹²

⁶⁰² *Le Roux and Others v Viana NO and others 2008 (2) SA 173 SCA* para 1 - 4.

⁶⁰³ *Le Roux and Others v Viana NO and others 2008 (2) SA 173 SCA* para 1 - 6.

⁶⁰⁴ *Le Roux and Others v Viana NO and others 2008 (2) SA 173 SCA* para 9- 10.

⁶⁰⁵ *Le Roux and Others v Viana NO and others 2008 (2) SA 173 SCA* para 9- 10.

⁶⁰⁶ 2011 ZASCA 245 para 8-9.

⁶⁰⁷ *Industrial Development Corporation of South Africa Ltd v PFE International Inc (BVI)* 2011 ZASCA 245 para 8 - 9.

⁶⁰⁸ Section 7(1) states:

'This Act does not apply to a record of a public body or a private body if-

(a) That record is requested for the purpose of criminal or civil proceedings;

(b) So requested after the commencement of such criminal or civil proceedings, as the case may be; and

(c) The production of or access to that record for the purpose referred to in paragraph (a) is provided for in any other law...'

⁶⁰⁹ *Industrial Development Corporation of South Africa Ltd v PFE International Inc (BVI)* 2011 ZASCA 245 para 8 - 9.

⁶¹⁰ *Industrial Development Corporation of South Africa Ltd v PFE International Inc (BVI)* 2011 ZASCA 245 para 8 - 9.

⁶¹¹ *Industrial Development Corporation of South Africa Ltd v PFE International Inc (BVI)* 2011 ZASCA 245 para 9.

⁶¹² *Industrial Development Corporation of South Africa Ltd v PFE International Inc (BVI)* 2011 ZASCA 245 para 9.

The court averred that a party must only use PAJA before it can ask for discovery in terms of the rules.⁶¹³ The rules of the respective courts should be invoked after the proceedings are instituted.⁶¹⁴ There are other important rules that require notices be issued such as notice to discover.⁶¹⁵ Other notices relate to subpoenas⁶¹⁶ and medical examination.⁶¹⁷

According to Erasmus and Van Loggerberg, Rule 26 of the Magistrates' Courts' Rules is just as important as Rule 35 of the Uniform Rules of Court.⁶¹⁸ Evidence may be secured by serving subpoena, interrogatories, and commission *de bene*.⁶¹⁹ Although the Rule in question enables recording during the process of gathering evidence *per se*,⁶²⁰ it appears that the Rule does not completely embrace e-technology during this phase. Pete *et al* indicate that interrogatories are regulated in both the Rules as well as section 52 of the Magistrates' Court Act.⁶²¹ The same provision, according to these scholars, provides for a process of taking or gathering evidence through commission *de bene*.⁶²² Pete *et al* argue that Rule 26 enables the parties to file these interrogatories in court.⁶²³

According to Jones and Buckle Rule 29 recognises, to a certain extent, the use of e-technology in trial proceedings.⁶²⁴ These scholars prove the recognition of e-technology in court proceedings referring to the case of *S v MacLaggan*⁶²⁵ where a witness was in a foreign jurisdiction and could not testify. The High Court considered the possibility of giving evidence by video conference. The court held:

"This matter involves a foreign national who is outside of the court's jurisdiction and it is therefore not easy to ensure the attendance of witnesses. Failure to

⁶¹³ *Industrial Development Corporation of South Africa Ltd v PFE International Inc (BVI)* 2011 ZASCA 245 para 9.

⁶¹⁴ *Industrial Development Corporation of South Africa Ltd v PFE International Inc (BVI)* 2011 ZASCA 245 para 9 - 10.

⁶¹⁵ Rule 23 of the Magistrates' Courts' Rules.

⁶¹⁶ Rule 26 of the Magistrates' Courts' Rules.

⁶¹⁷ Rule 24 of the Magistrates' Courts' Rules.

⁶¹⁸ Harms *Civil Procedure in Magistrates' Courts* B - 221.

⁶¹⁹ Harms *Civil Procedure in Magistrates' Courts* B - 221.

⁶²⁰ Harms *Civil Procedure in Magistrates' Courts* B - 221.

⁶²¹ Pete *et al Civil Procedure* 289 – 990.

⁶²² Pete *et al Civil Procedure* 289 – 990.

⁶²³ Pete *et al Civil Procedure* 289 – 990.

⁶²⁴ Erasmus and Van Loggerenberg Jones and Buckle: *The Civil Practice of the Magistrates' Courts in South Africa* Service 15 2017.

⁶²⁵ *S v McLaggan* 2012 ZAECHGHC 75 and Erasmus and Van Loggerenberg Jones and Buckle: *The Civil Practice of the Magistrates' Courts' in South Africa* 15 2017.

receive the evidence by way of video link would not only result in an unnecessary and potentially lengthy delay to the prejudice of the accused but may also have had the effect that such evidence is ultimately not available to the court. In the light of these circumstances I considered that the use of the video link technology would not prejudice the accused having regard to the nature of the evidence. I shall deal hereunder with the impact of the evidence so received.”⁶²⁶

This case shows that courts are flexible and that there is a need to amend the Rules to enforce ECTA provisions and development of advancing e-technology.

It is submitted that the Rules do not indicate or expressly recognise the use of electronic means of delivery or service of such notices. This calls for a review of these rules which are provided in chapter 5.

6. Rules regulating matters in respect of Small Claims Courts

The Minister passes the Rules of the Court⁶²⁷ in terms of the Small Claims Court Act.⁶²⁸ Proceedings in the Small Claims Court are very different from those in other courts.⁶²⁹ There is no judge presiding and there are no legal representatives.⁶³⁰ Commissioners preside upon these courts.⁶³¹ The Commissioner plays an active role in these proceedings.⁶³² The parties represent themselves and present their own evidence.⁶³³

The Rules that will be affected by e-technology relate to processes followed to issue and serve summons.⁶³⁴

Rule 1 defines delivery as including filing and service of a copy of the documents to the other party.⁶³⁵ The clerk of the court issues summons according to Rule 3.⁶³⁶ This rule obliges the clerk to number the summons.⁶³⁷

⁶²⁶ *S v McLaggan* 2012 ZAECGHC 75 para 3.

⁶²⁷ The preamble of the Rules regulating matters in respect of Small Claims Courts [hereinafter referred to as the Rules of the Small Claims Court]

⁶²⁸ The preamble of the Rules of Small Claims Court and section 25 of the Small Claims Act 61 of 1984.

⁶²⁹ *Pete et al Civil Procedure* 486-487.

⁶³⁰ Rule 23 of the Rules of the Small Claims Court.

⁶³¹ *Pete et al Civil Procedure* 487.

⁶³² *Pete et al Civil Procedure* 487.

⁶³³ *Pete et al Civil Procedure* 486 - 487.

⁶³⁴ Rule 9; 12 and 13 of the Rules of the Small Claims Court.

⁶³⁵ Rule 1 of the Rules of the Small Claims Court.

⁶³⁶ Rule 3 of the Rules of the Small Claims Court.

⁶³⁷ Rule 3 of the Rules of the Small Claims Court.

There is an additional requirement for parties to number the documents served or delivered by the plaintiff or defendant.⁶³⁸ The clerk is obliged to manually sign court documents.⁶³⁹ It is observed that there is no reference to electronic means of affecting these court processes. This calls for an amendment of Rule 3 to accommodate the ECTA, particularly, section 13 and other relevant provisions.

Rule 4 provides that court processes must be served ⁶⁴⁰ and executed by sheriff.⁶⁴¹ It is submitted that there is no reference to the recognition of e-technology in this Rule. This therefore calls for an amendment to incorporate e-technology law.

Rule 9 confirms the manner of effecting service of summons.⁶⁴² The Rule confirms that the clerk of the court must sign the summons but there is still no reference to the recognition of electronic signature.⁶⁴³ Van der Merwe *et al* aver that advanced electronic signature is accepted as a valid signature in legal proceedings.⁶⁴⁴ Furthermore, Van der Merwe *et al* argue it is prudent to ensure documents are accessible.⁶⁴⁵

Rule 12 is equally significant because it requires the plaintiff to make copies of documents and, it is argued, this is a waste of paper and money.⁶⁴⁶ Rule 12 also provides that the sheriff may affect service of the summons.⁶⁴⁷ The summons must be delivered to the clerk of the Small Claims Court. ⁶⁴⁸

⁶³⁸ Rule 3(2) of the Rules of the Small Claims Court.

⁶³⁹ Rule 3(5) of the Rules of Small Claims Court.

⁶⁴⁰ Rule 4 of the Rules of Small Claims Court.

⁶⁴¹ Rule 4 of the Rules of Small Claims Court.

⁶⁴² Rule 9 of the Rules of Small Claims Court.

⁶⁴³ Rule 4 (2) of the Rules of the Small Claims Court.

⁶⁴⁴ Van der Merwe *et al* *Information and Communications Technology Law* 116.

⁶⁴⁵ Van der Merwe *et al* *Information and Communications Technology Law* 115.

⁶⁴⁶ Rule 12(1) of the Rules of the Small Claims Court.

⁶⁴⁷ Rule 12 of the Rules of the Small Claims Court.

⁶⁴⁸ Rule 12(4) of the Rules of the Small Claims Court.

Rule 13 supports different methods of effecting service. These are personal service,⁶⁴⁹ service at place of residence or place of business,⁶⁵⁰ place of employment,⁶⁵¹ at the *domicilium* chosen,⁶⁵² principal place of business,⁶⁵³ and by registered post.⁶⁵⁴ The Rule also allows the sheriff to affix the summons or documents on the door of residence⁶⁵⁵ where the defendant avoids being served.⁶⁵⁶

There is a need to amend the rules to ensure compliance with the ECTA and e-technology law. A proposed draft of the suggested amendments is provided in chapter 5.

Preliminary conclusion

It is evident that the current South African court rules are – and will in future be – impacted by e-technology. In extension, it is averred, they are not yet sufficiently abreast with developments in e-technology law and the ECTA. It is further submitted that challenges will result from the implementation of the ECTA and e-technology law. For example, the service of documents currently effected by sheriffs will in future be affected through digital or electronic means of communication. The impact is also illustrated in the filing of court processes, which in future will be digitally or electronically implemented. There is thus a need to draft amendments that will accommodate this gap.

It is observed that the Constitutional Court is well advanced in using e-technology. However, there is need to further modify and amend the current rules to ensure full compliance with the ECTA provisions and other e-technology legislation.

Lastly, there is no doubt that the recommendations and draft amendments provided in chapter 5 will address the concerns named in the current rules of the respective courts.

⁶⁴⁹ Rule 13(1)(a) of the Rules of the Small Claims Court.

⁶⁵⁰ Rule 13(1)(b) of the Rules of the Small Claims Court.

⁶⁵¹ Rule 13(1) (c) of the Rules of the Small Claims Court.

⁶⁵² Rule 13(1)(d) of the Rules of Small Claims Court.

⁶⁵³ Rule 13(1) (e) of the Rules of Small Claims Court.

⁶⁵⁴ Rule 13(1)(f) of the Rules of Small Claims Court.

⁶⁵⁵ Rule 13(4) of the Rules of Small Claims Court.

⁶⁵⁶ Rule 13(4) of the Rules of Small Claims Court.

In chapter 4 the researcher conducts a comparative analysis of e-technology and civil procedure between South Africa, England, the United States of America, and Canada.

CHAPTER FOUR - COMPARATIVE ANALYSIS OF CIVIL PROCEDURE AND E-TECHNOLOGY

Chapter preface

This chapter examines comparative legislation and jurisprudence, which had an influence on South African law of civil procedure, as well as e-technology law currently in place in these jurisdictions. The jurisdictions under examination are England, the United States of America, and Canada. The laws that regulate these jurisdictions in civil procedure and e-technology are analysed. After discussing each authority separately, comparison is made to find similarities and differences to South African law of civil procedure and to seek possible solutions to the challenges identified in earlier chapters.

1. Introduction

The international jurisdictions in this research are advanced in implementing e-technology law. This chapter begins by examining the history of civil procedure, and thereafter interrogates current legislation, case law, and jurisprudence in England, the United States of America, and Canada. The discussion is followed by comparative analysis with South African legislation and jurisprudence to demonstrate the extent to which differences or similarities exist. The researcher highlights international best practices and the significance of acknowledging and applying e-technology law.

In England where there is currently a pilot project enforcing the use of digital e-technology law in civil proceedings, and incorporated into practice directions and courts rules.¹ In the United States of America, civil procedure is mostly regulated by the Federal Rules of Civil Procedure of 2016.² These rules are to a certain extent similar to the South African Uniform Rules of Court and Magistrates' Courts Rules.³

¹ Practice Direction 510 – The Electronic working pilot scheme; the practice direction supplements CPR rules 5.5 and 7.2 <https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part29>(Date of use: 30 August 2017) and Pyke J *A-Z Civil Litigation* 1st ed (Sweet & Maxwell London 2001) 1- 975.

² Federal Rules of Civil Procedure.

³ For example, the discovery process that is contained in rule 35 of the Uniform Rules of Court

In Canada, various statutes and respective rules regulate civil procedure.⁴ The Supreme Court Act regulates the proceedings; for example, it confirms how sheriffs must perform their functions.⁵ The civil procedure rules in Canada enable parties to commence proceedings by filing a statement of claim.⁶ These Canadian proceedings will be examined and compared to South African law in order to facilitate effective litigation in various provinces. For example, the Supreme Court⁷ replaces the court of law⁸ and equity in Canada⁹ which functioned before the Act came into operation.¹⁰

Electronic legislation in international jurisdictions is in-line with United Nations Commission on International Trade Law (UNCITRAL) Model Law on electronic commerce of 1996.¹¹ The latter was passed to set out acceptable international standards for operating and maintaining electronic communication.¹² Geist affirms that UNCITRAL was drafted to enable parties or jurisdictions to have accessible commercial laws.¹³ The promulgation of UNCITRAL introduced the use of electronic signatures.¹⁴ As stated earlier, the South African ETCA and LLSA Guidelines lend much from this Model.

This chapter will examine the law of civil procedure and e-technology law in the three countries and find differences and similarities. In addition, it will determine how the law in these jurisdictions can assist the South African legislature to consolidate current statutes and respective rules cognisant of the ECTA and advances in e-technology.

and rule 23 of the Magistrates' Court is also provided in rule 26 of the Federal Rules of Civil Procedure. Another relates to the fact that the clerk of terms of the court in the Magistrates' Courts' Rules issues the summons just as it is the case in the Federal Rules of Civil Procedure.

⁴ Walker J and Sossin L 1st ed *Civil Litigation* (Irwin Law Inc. Toronto 2010) 1 – 31.

⁵ Section 94 of the Supreme Court Act of 1985

⁶ Shafer M and Saunders M 'Litigation and enforcement in Canada: Overview Dispute Resolution Global Guide' 2016 Thomson Reuters 1025/16
<https://uk.practicallaw.thomsonreuters.com/> (Date of use: 15 January 2018)

⁷ Section 3 of the Supreme Court Act of 1985.

⁸ Section 3 of the Supreme Court Act of 1985.

⁹ Section 3 of the Supreme Court Act of 1985.

¹⁰ Section 3 of the Supreme Court Act of 1985.

¹¹ http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/1996Model.html
 (Date of use: 1 December 2017) UNCITRAL is designed to enable international jurisdiction such as 'Arabic, Chinese, English, French and Russian' to effectively communicate through electronic commerce. It enables effective storage of information. For example, 'electronic e-mail and telecopy, with or without the use of support as the internet.'

¹² The purpose of the of the UNCITRAL Model on electronic commerce of 1998.

¹³ Geist M UNCITRAL 'Model Law on Electronic Commerce – ITU' 2009 University of Ottawa A *guide to Global E - Commerce Law* 1 - 33.

¹⁴ Geist A Guide to *Global E-Commerce Law* 3.

2. England

2.1 History of Civil Procedure

The existence of courts in England goes back as far as the Norman Conquest in the 12th century.¹⁵ More courts were operating before the Civil Procedure Act of 1997 came into operation.¹⁶ These courts were called 'Great Council or Magnum Concilium, the Kings Court,¹⁷ the Ecclesiastical Court which were regarded as lesser kings courts,¹⁸ Exchequer court, the county courts,¹⁹ the Burgmot,²⁰ the Hundred or Wapentake court,²¹ the Manorial Court and the Forest Courts.

The authority of these courts originated from equity jurisdiction²² with the exception of Ecclesiastical courts whose jurisdiction stemmed from the authority of the church.²³ This particular court dealt with matters referred to it by the king, archbishops, bishops, priests, and deacons who played a significant role in presiding over disputes or claims.²⁴

The court where most litigation occurred was the county courts.²⁵ The king passed a law called the conqueror, which regulated the judicial system and the extent of the powers of the clergy and drew the line between causes of action relating to spiritual cause, such as payments of tithes and offerings, and those regulated by law or by the conqueror charter.²⁶

¹⁵ Bigelow M M *History of Procedure in England from the Norman Conquest: The Norman Period (1066 – 1204)* 1st ed (Little Brown and Company Boston 1880)1-23.

¹⁶ There are only three divisions in terms of the Civil Procedure Act of 1997 and these are discussed later in the chapter.

¹⁷ Bigelow *History of England* 14-27.

¹⁸ Bigelow *History of England* 14-27.

¹⁹ Bigelow *History of England* 14-27.

²⁰ Bigelow *History of England* 14-27.

²¹ Bigelow *History of England* 14-27.

²² Equity jurisdiction according to Oladotun Gbolagunte ACarb, refers to a phrase that stems from common law, which simply means that the parties to the proceedings must be treated fairly or substantial justice. Equity Common Law (Fused or Independent)
<http://www.linkedin.com/pulse/equity-v-common-law-fused-independent-oladotun-gbolagunte>
(Date of use: 13 March 2018)

²³ Bigelow *History of England* 25- 103.

²⁴ Bigelow *History of England* 28.

²⁵ Bigelow *History of England* 28.

²⁶ Bigelow *History of England* 30 -31.

Andrews avers that the main sources of civil procedure in England are currently, legislation, rules, and practice direction.²⁷ Robertson argues that England's courts were presided over by judge and jury until 1854.²⁸ In delictual claims archdeacons and bishops issued summons.²⁹ Civil claims were begun issuing simple summons.³⁰ The different jurisdictions discussed in this chapter do not have simple or combined summons. Summonses were served to the defendant in person or *by letters placed on the altar*.³¹ The defendant was given three opportunities to obey, failing which the latter was in contumacy.³²

The section that follows immediately below discusses the Constitution of the United Kingdom and other legislation in the UK relevant to this chapter. These are compared to South Africa's Constitution and other law systems.

2.2 Statutes regulating civil procedure

2.2.1 The Constitution of the United Kingdom³³

The British Constitution supports the establishment of different court structures in England.³⁴ Rights are entrenched in the Bill of Rights,³⁵ namely, the protection of the right to privacy and family life.³⁶ Section 8 further extends privacy protection to include correspondence, similar to section 14 of the South African Bill of Rights.³⁷

A party whose rights have been infringed may institute civil proceedings for damages or other court processes regarded as a relief in terms of section 25.³⁸

²⁷ Andrews NH 'English Civil Procedure: A Synopsis' 2008 *Ritsumeikan Law Review* 25 - 37.

²⁸ Robertson DW 'The Precedent Value of conclusions of Fact in Civil Procedure' 1968 *Louisiana Law Review Vol 29* 78 – 99.

²⁹ Bigelow *History of England* 37.

³⁰ Bigelow *History of England* 56.

³¹ Bigelow *History of England* 56.

³² Bigelow *History of England* 56.

³³ Although the United Kingdom does not have a specific codified constitution, the term is used here for convenience. Britain does not have a codified constitution but an unwritten one formed of Acts of Parliament, court judgments and conventions.

³⁴ Section 93 of the Constitution of the United Kingdom.

³⁵ The Bill of Rights is an act of Parliament dealing with constitutional matters and civil rights. In line with footnote 33 above it does not form part of a codified constitution.

³⁶ Section 8 of the Constitution of the United Kingdom.

³⁷ Section 8(1) of the Constitution of the United Kingdom.

³⁸ Section 25 of the Constitution of the United Kingdom.

The Constitution grants parties' access to information and makes available protection for personal privacy, legal privilege and commercial processes or transactions.³⁹

Section 25 is however subject to a limitation clause provided in section 28(2)(3) of the Constitution of the United Kingdom.⁴⁰ Section 28 is akin to section 36 of the South African Constitution because it limits the right entrenched in the Bill of Rights. Section 93 of the Constitution of the United Kingdom is very significant in civil procedure because it sets out provisions that set up different court structures,⁴¹ akin to 166 to 171 of the Constitution of the Republic of South Africa.⁴²

There is a Supreme Court and other courts established in terms of the Constitution.⁴³ There are provisions determining the jurisdiction of the Supreme Court and other courts, which relate to disputes amongst parties in court proceedings and other pertinent matters, such as Bill of Rights disputes and interpretation of parliamentary disputes.⁴⁴ There are also other courts established in accordance with Schedule 4 of the Constitution of the United Kingdom. They include, the court of appeal, which is regarded as the superior court in England and Wales,⁴⁵ the High Court, regarded as the superior court for civil and public proceedings,⁴⁶ and the Crown Court that deals with criminal matters.⁴⁷

³⁹ Section 28 of the Constitution of the United Kingdom. Section 28(1) states that: '...There is a right of access by the public to the information held by any public authority performing functions with respect to the government of the United Kingdom, a nation or a religion, or to local Government'.

⁴⁰ Section 28(2) states that: '...This right is subject only to such limitations as are prescribed by law and are necessary in a democratic society – (3) For the protection of a personal privacy, legal privilege or commercial processes or transactions'.

⁴¹ Section 93 of the Constitution of the United Kingdom.

⁴² Section 93 states that: '... (1) There is established by this Constitution a Supreme Court for the United Kingdom, having the membership and jurisdiction set out in Part 2. (2) Further United Kingdom courts may be established under Part 2.... There are also other courts that are established in different districts within England, and their jurisdiction is determined by the provisions of Schedule 4 of the Constitution. Schedule 4 Part 1 states: '...The courts for England and Wales are -

1.1 A Court of Appeal (which is a superior court).

1.2 A High Court for Civil and public proceedings (which is a superior court).

1.3 A Crown Court for criminal proceedings (which is a superior court)

1.4 Such other courts and tribunals, as may be established by Act of Parliament (which may be designated either as intermediate or inferior courts)'.

⁴³ Section 96 of the Constitution of the United Kingdom.

⁴⁴ Section 98 of the Constitution of the United Kingdom.

⁴⁵ Schedule 4 of the Constitution of the United Kingdom.

⁴⁶ Schedule 4 of the Constitution of the United Kingdom.

⁴⁷ Schedule 4 of the Constitution of the United Kingdom.

Andrews indicates that the courts *a quo* are County Courts and High Courts.⁴⁸ Andrews further avers that small claims and actions for moderate amounts must be determined by County Courts.

There are also other tribunal courts created in terms of parliamentary statutes.⁴⁹ Section 98 of the Constitution is equally important because it affirms the jurisdiction of the Supreme Court.⁵⁰ The Schedules further confirm the provisions of the Constitution.⁵¹

For example, Article 25 of the Constitution enables a party to a dispute to institute proceedings when his/her rights are infringed and, if proven, the party will be awarded damages.⁵² This is similar to section 38 of the South African Constitution as it provides remedies to parties whose rights are infringed. Another article of importance is Article 20 because it has similar provisions to section 8 of the South African Constitution. Article 20 states that the Bill of Rights applies to individuals, government, and other public authorities.⁵³ This article is analogous to section 8 of the South African Constitution because section 8 provides that the Bill of Rights binds natural persons, the government, and juristic persons.⁵⁴

Article 93 and 101 reinforce provisions relating to the establishment of courts.⁵⁵ These articles are similar to sections 166 to 171 of the South African Constitution discussed in chapter 2 which provide for the creation of different courts within South Africa.⁵⁶

⁴⁸ Andrews *The Modern Civil Process Judicial and Alternative Forms of Dispute Resolution* 1- 49.

⁴⁹ Schedule 4 of the Constitution of the United Kingdom.

⁵⁰ Section 98(2) and (5) of the Constitution of the United Kingdom. Section 98 states: '... (2) This Supreme Court has appellate jurisdiction in the following matters ...(5) any proceedings giving rise to a question of law (including the interpretation of statutes) in relation to which uniformity throughout the United Kingdom or in more than jurisdiction within the United Kingdom is, in the opinion of the Supreme Court, desirable ...'

⁵¹ The Schedules of the Constitution of the United Kingdom.

⁵² Article 25 of the Constitution of the United Kingdom.

⁵³ Article 20 states that: '...A Bill of Rights is mainly intended to protect individuals and minorities against the misuse of power by government bodies and other public authorities'.

⁵⁴ Section 8 of the Constitution.

⁵⁵ Articles 93 and 101 of the Constitution of the United Kingdom.

⁵⁶ Sections 166 -171 of the Constitution.

2.2.2 Civil Evidence Act of 1968

The Civil Evidence Act deals specifically with the manner in which evidence presented in court ought to be admitted.⁵⁷ For example, statements, oral evidence, and computer evidence may be admissible as such in terms of this Act.⁵⁸ Unlike other jurisdictions,⁵⁹ England recognised as far back as 1968, the admissibility of computer evidence subject to certain conditions.⁶⁰ For example, section 5 and 10 of the Civil Evidence Act permitted the admissibility of documents and statements produced by a computer.⁶¹

The nub of the Civil Evidence Act is to recognise computer-based evidence. This can be traced as far back as 1960 when it was promulgated with the aim of using and discovering computer evidence in civil proceedings.⁶²

Section 10 is important because it recognises the admissibility of evidence in the form of a document produced by a computer.⁶³ This section defines and narrows the meaning of documentary evidence to include data, photographs, discs, and so forth and allows courts to admit this kind of evidence in civil proceedings.⁶⁴

⁵⁷ Section 5 of the Civil Evidence Act of 1968 [Hereinafter referred to as the Civil Evidence Act]

⁵⁸ Section 5(1) of the Civil Evidence Act.

⁵⁹ *Naris v SA Bank of Athens* 1976 2 SA 573 A.

⁶⁰ Section 5 of the Civil Evidence Act of.

⁶¹ Section 5 (2) Subsection 4(b) –and 10 (1) (a) –(d) of the Civil Evidence Act.

Section 5(2) provides that the admissibility of computer must satisfy the following conditions:

(a) the document is admissible if it was produced at the time upon which the computer was used to store and process information for the purpose of business or individual use;

(b) the information on the document must be connected to the information regularly supplied to the computer in ordinary course of those activities.

(c) At the time of using and storing the information, the computer must have been a good working condition to confirm authenticity of the document;

(d) ... The information contained in the statement reproduces or is derived from the information supplied to the computer. There is more narrow provision that relates to the civil proceedings in particular and this is set out in Section 5(4) of the Civil Evidence Act. This provision requires that there be a certificate issued that:

1. identifies the document and manner of production;

2. give details of the device that assisted in the product;

3. dealing with any of the matters to which the conditions mentioned...;

4. must be signed by ict who operates the device.

⁶² Civil Evidence Act of 1997.

⁶³ Section 10(1) of the Civil Evidence Act.

⁶⁴ Section 10(1)(a) - (d) of the Civil Evidence Act.

2.2.3 The Civil Evidence Act of 1972

This Act enforced and regulated admissibility of evidence produced by a computer.⁶⁵ For example, it set out standards that illustrate the manner in which oral expert evidence should be presented.⁶⁶ This Act was passed to put emphasis on the admissibility of evidence presented by experts in civil proceedings.⁶⁷ It likewise promotes the admissibility of evidence in the form of statement and opinion.⁶⁸

The relevant section as far as this Act is concerned is section 1. It reinforces section 5 of the Civil Evidence Act of 1968, which officially recognises the admissibility of evidence created by a computer.⁶⁹

2.2.4 The Civil Evidence Act of 1995

This Act is significant in the admissibility of hearsay evidence in civil proceedings.⁷⁰ It sets out the process that parties must follow when hearsay is used in civil proceedings.⁷¹ This Act requires parties to issue notice that hearsay will be used and the opposing party is given an opportunity to request further particulars relating to the hearsay evidence that will be used during the proceedings.⁷²

⁶⁵ The preamble and section 2 of the Civil Evidence Act of 1972.

⁶⁶ Section 1 of the Civil Evidence Act of 1972.

⁶⁷ The preamble and section 1 of Civil Evidence Act of 1972. Section 1(1) states 'Subject to the provisions of this section, Part 1 (hearsay evidence) of the Civil Evidence Act 1968, except section 5 (statements produced by computers), shall apply in relation to statements of opinion as it applies in relation of fact, subject to the necessary modifications and in particular the modification that any reference to a fact stated in a structure shall be construed as a reference to a matter dealt with therein'.

⁶⁸ The preamble and section 1 of the Civil Evidence Act of 1972.

⁶⁹ Section 1 of the Civil Evidence Act of 1972.

⁷⁰ The preamble of the Civil Evidence Act of 1995.

⁷¹ The preamble and section 1 of the Civil Evidence Act of 1995.

⁷² Section 2(1) (a) and (b) of the Civil Evidence Act of 1995. Section 2(1) states: 'A party proposing to adduce hearsay evidence to civil proceedings shall subject to the following provisions of this section, give to the other party or parties to the proceedings-
(a) Such notice (if any) of that fact and
(b) On request, such particulars of or relating to the evidence as is reasonable and practicable in the circumstances and practicable in the enabling him or them to deal with any matters arising from its being hearsay'.

The relevant sections in this Act are sections 9 and 13 because they reiterate the meaning of document as defined in the Civil Evidence Act of 1968⁷³ and permit courts to admit documents and statements⁷⁴ in civil proceedings.⁷⁵

2.2.5 The Civil Procedure Act of 1997

In terms of the Civil Procedure Act, a committee drafts all rules of the different courts, such the rules of the Court of Appeal, the High Court, and other courts.⁷⁶ The Lord Chancellor gives direction to practice and procedure for the county courts. These directions are narrowed down later in this chapter. Section 2 states that the committee that drafts the rules of the respective courts is referred to as the Civil Procedure Rules Committee.⁷⁷ This Committee is akin to the Rules Board in the South African context.

2.2.6 Magistrates Court Act of 1980

This Act was introduced to confer magistrates' courts with powers to determine matters relating to both civil and criminal proceedings.⁷⁸ Insofar as civil matters are concerned; magistrates' court powers are limited within their areas. This is akin to the South African position. Unlike South African civil proceedings, the aggrieved party lodges a complaint to the justice of the peace who in return issue summons to the defendant.⁷⁹ Notice is issued and calls upon the parties to attend the hearing⁸⁰ where the parties lead evidence before court.⁸¹

When the court decides a matter, and the party who ought to comply with the order has failed to do so, the court can issue a warrant of arrest to enforce the order.⁸²

⁷³ Sections 9 and 13 of the Civil Evidence Act of 1995.

⁷⁴ Section 8 of the Civil Evidence Act of 1995.

⁷⁵ Section 9 and 13 of the Civil Evidence Act of 1995.

⁷⁶ Sections 2 and 3 of the Civil Procedure Act of 1997 [Hereinafter referred to as the Civil Procedure Act].

⁷⁷ Section 2 of the Civil Procedure Act.

⁷⁸ The preamble of the Magistrates' Court Act.

⁷⁹ Section 5 of the Magistrates' Courts Act.

⁸⁰ Section 53 of the Magistrates' Courts Act.

⁸¹ Section 54 of the Magistrates' Courts Act.

⁸² Part III of the Magistrates' Court Act.

The court can also convict the defendant on the debt owed to the plaintiff.⁸³ If the defendant fails to comply with the order of payment, he/she may be sent to prison.⁸⁴ This is unlike the enforcement process in South Africa where debtors prisons have long been abolished.

Witnesses may be subpoenaed to give evidence in the magistrate's court⁸⁵ and can be issued with subpoena *duces tecum*.⁸⁶ The different forms of evidence presented may be in a form of documents⁸⁷ or statements.⁸⁸ The parties may also lead oral evidence through witnesses.

Parallel to South African courts, English courts have rules that must be followed during civil proceedings.⁸⁹ These rules are drafted to regulate proceedings in the magistrates' courts as is the case in South African magistrates' courts.⁹⁰ The rules are discussed later in this chapter.

2.2.7 Civil Jurisdiction and Judgment Act of 1982

The reason why this Act was passed was to confer power to the courts to determine civil matters and effectively enforce judgments.⁹¹ This Act ensures the enforcement of article 31 of the 1968 Convention.⁹² Section 11 of the Civil Jurisdiction and Judgment Act acknowledges the admissibility of documents used during court proceedings.⁹³ Concisely, the Act illustrates processes, such as execution of judgments carried out by sheriff.⁹⁴ It further establishes an offence, if a party does not comply with judgment. Thus, the party in question will be in contempt of court.⁹⁵ Enforcement is also carried out by issuing fines.⁹⁶

⁸³ Section 75(1) of the Magistrates Court Act.
⁸⁴ Section 92(1) (a) to (c) of the Magistrates Courts' Act.
⁸⁵ Section 97(1) of the Magistrates' Courts Act of 1980.
⁸⁶ Section 97(2) of the Magistrates' Courts Act of 1980.
⁸⁷ Section 102(3); (4) and (6) of the Magistrates' Courts' Act.
⁸⁸ Section 102(3) of the Magistrates' Courts Act.
⁸⁹ Section 74 of the Magistrates' Courts Act.
⁹⁰ Section 74 of the Magistrates' Courts' Act.
⁹¹ Civil Jurisdiction and Judgment Act of 1982 [Herein after referred to as the Civil Jurisdiction and Judgment Act].
⁹² The aim of Civil Jurisdiction and Judgement Act.
⁹³ Section 11 of the Civil Jurisdiction and Judgment Act.
⁹⁴ Section 18(2) (c) of the Civil Jurisdiction and Judgment Act.
⁹⁵ Section 18(4)(b) of the Civil Jurisdiction and Judgment Act.
⁹⁶ Section 18(1)(a) of the Civil Jurisdiction and Judgment Act.

2.2.8 Sheriffs Act of 1887

This is a very old statute that aims to regulate processes pertinent in the operation and administration of court process. It sets out procedures for the appointment of sheriffs and the duration of their term in office.

The relevant provisions of this Act in civil procedure are sections 3;⁹⁷ 10,⁹⁸ 11⁹⁹ and 14.¹⁰⁰ Section 3 is different to the South African Sheriffs Act 90 of 1986, which permits sheriffs to practice as such until they retire.¹⁰¹ Unlike sheriffs in the South African courts, they do not serve summons; the claimant serves documents in terms of the practice directives.¹⁰²

2.2.9 Electronic Communications Act of 2000

This Act was introduced to regulate processes regarding the manner in which electronic communications ought to be operated.¹⁰³ This is achieved by ensuring that stored data is properly managed.¹⁰⁴ The same applies to used data.¹⁰⁵ The Secretary¹⁰⁶ is obliged to set up a cryptography support service.¹⁰⁷

⁹⁷ Section 3 of the Sheriffs Act deals with the appointment process of the sheriffs. According to this provision, sheriffs are only appointed for a year. They are also not precluded from seeking appointment for the duration of three years after they performed duties of the sheriff. The appointment of sheriffs is contained in Section 3(2), and stipulates that sheriffs are appointed by the Lord High Chancellor.

⁹⁸ Section 10 provides for the execution of writs subsection (1) permits the sheriffs to issue a receipt to those who request writ executions. The said receipt must confirm the particulars of the actual delivery of the writ.

⁹⁹ Section 11 provides for processes of receiving debts arising from the judgments. For example, the sheriffs when collecting cash from the debtors, are required to keep a record of all the receipts relating to the payments they receive.

¹⁰⁰ Section 14 indicates that the sheriff may arrest defendants in regard to civil debts.

¹⁰¹ Section 4 of the Sheriffs Act 90 of 1986.

¹⁰² Part 7 of the Practice Directives regulates the process that the claimant must follow when commencing court's proceedings. Item 7.3 specifically provides the service of the court's documents or particulars by the claimant.

¹⁰³ The preamble of the Electronic Communications Act of 2000.

The preamble states: 'An Act to make provision to facilitate the use of electronic communications and electronic data storage; to make provision about the modification of licences granted under section 7 of the Telecommunications Act 1984, and for connected purposes'.

¹⁰⁴ The preamble of the Electronic Communications Act of 2000.

¹⁰⁵ The preamble of the Electronic Communications Act.

¹⁰⁶ The Secretary in this context refers to the Secretary of the State in England.

¹⁰⁷ This according to Spies *et al* refers to a manner of digitally protecting privacy of information from the parties who are not party to such electronic communications. Cryptography system and method for providing cryptographic services for a computer application. <http://patents.google.com/patent/US5689565A/en> (Date of use: 15 March 2018)

By comparison there are similar provisions in section 29 – 32 of the South African ECTA.¹⁰⁸ The Secretary is required to keep record of the particulars of the support service.¹⁰⁹ The other important provision in this Act is section 15 because it sets out the definition of electronic communications as well as the meaning of a document.¹¹⁰

It is important to note that the Electronic Communications Act in the UK is not as meticulous as the ECTA insofar as the protection of data used and stored is concerned.¹¹¹ There is no definition of data itself in the UK Act as provided in section 1 of the South African ECTA.¹¹² Furthermore, there is no provision relating to the recognition of electronic signatures as in section 13¹¹³ of the South African ECTA. There is no specific provision in the UK Act regulating admissibility of electronic communication information, as is the case in section 15 of the ECTA.¹¹⁴ This however may be because admissibility is dealt with in a separate act as demonstrated earlier in this discussion. Unlike, the South African ECTA,¹¹⁵ the UK Act does not make provision for the electronic collection of personal information.¹¹⁶

2.2.10 Practice Direction or Rules Regulating Civil Proceedings in England

Practice directions regulate the use of e-technology in civil proceedings in the UK.¹¹⁷

This view is also shared by Mogollon in his book. Mogollon M *Cryptography and Security Services Mechanisms and Applications* 2007 (Cybertech publication New York) 1-58.

¹⁰⁸ Section 1 (1) of the Electronic Communications Act of 2000.

¹⁰⁹ Section 1 (3) of the Electronic Communications Act of 2000.

¹¹⁰ Section 15(1) states that:
 ‘...In this Act, except in so far as the context otherwise requires— “document” includes a map, plan, design, drawing, picture or other image; “communication” includes a communication comprising sounds or images or both and a communication effecting a payment; ...’

¹¹¹ Section 50 of the ECTA provides for the protection of personal information. For example, ‘A data controller must subscribe to all the principles outlined in section 51 and not merely parts thereof’. Section 51 obliges data controllers to obtain permission in writing from the data subjects before such disclosure takes place. The exception is only in cases where the law requires the data controller to disclose such personal information.

¹¹² Section 1 of the ECTA.

¹¹³ Section 13 provides for the recognition of electronic communications, this was discussed in chapter 2 on pages 9 and 12 earlier.

¹¹⁴ Section 15 of the ECTA deals with admissibility and evidential weight of data messages.

¹¹⁵ Section 51 of the ECTA.

¹¹⁶ UK Electronic Communications Act of 2000.

¹¹⁷ Practice Direction https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part07/pd_part07a Updated in January 2017 (Date of use: 20 September 2017).

They are drafted on instruction of the Lord Chancellor in terms of the Civil Procedure Act.¹¹⁸ A committee was created to ensure effective application of practice directions.¹¹⁹

The first important practice direction relates to the manner in which civil proceedings ought to be started.¹²⁰ The claim is issued by the court¹²¹ on request of the claimant.¹²² The claim form must set out the particulars of the cause of action.¹²³ The claimant must make sure that he/she serves the claim form on the defendant.¹²⁴ The claim form may be served personally,¹²⁵ by fax or electronically.¹²⁶ Andrews indicates that pleadings in England consist of statements of case and particulars of claim hence the same can be served electronically.¹²⁷ It is trite that this procedure is unlike that in South Africa in terms of the service method. It is encouraging that the English procedure makes direct provision for electronic service. England is so advanced that the claim may be issued right from the outset in terms of the rules.¹²⁸ This is very different from the South African civil proceedings because she has not yet embraced the notion of conducting all civil proceedings via electronic means or e-technology,¹²⁹ despite attempts to do so.¹³⁰

¹¹⁸ Sections 1, 2 and 3 of the Civil Procedure Act.

¹¹⁹ Sections 1, 2 and 3 of the Civil Procedure Act.

¹²⁰ Rule 7.2 of the Practice Direction – How to start proceedings: the claim form.

¹²¹ Rule 7.2 of the Practice Direction.

¹²² Rule 7.2 of the Practice Direction.

¹²³ Rule 7.5 of the Practice Direction.

¹²⁴ Rule 7.4 of the Practice Direction – How to start proceedings: the claim form.

¹²⁵ Rule 7.5 of the Practice Direction – How to start proceedings: the claim form.

¹²⁶ Rule 7.5 of the Practice Direction – How to start proceedings: the claim form.

¹²⁷ Andrews N *The Modern Civil Process – Judicial and Alternative Forms of Dispute Resolution in England* 1st ed (Mohr Siebeck Germany) 1- 49.

¹²⁸ Rule 7.12 of the Practice Direction – How to start proceedings: the claim form.

¹²⁹ The Uniform Rules of Court and Magistrates' Courts' Rules.

¹³⁰ LSSA 2015 page 11 – There is an attempt made in terms of rule 3.2 of the Government

Notice No.787, the latter states that: 'An acceptable electronic form is a form in which-

(a) The integrity of the electronic record satisfies the standard contained in section 14 of the Electronic Communications and Transactions Act;

(b) The person required to keep records are able to, within a reasonable period when required by SARS-

(i) Provide SARS with an electronic copy of the records in a format that SARS is able to readily access, read and correctly analyse,

(ii) Send the records to SARS in an electronic form that is readily accessible by SARS; or

(iii) Provide SARS with a paper of the records; and

(c) the records kept in an electronic form may be accessed by SARS for the purpose of performing a function referred to in section 3 of the Act'.

In the UK, electronic progress is extended to the filing system; England has an electronic filing system in civil proceedings.¹³¹ As a result, parties can access information relating to their matters online by protected password.¹³² The researcher is of the view that this is the kind of system needed in South Africa however, for it to work effectively, in addition to parties' use of the internet to access civil proceedings, government departments should be responsible for managing any e-technology filing system.

In terms of the Practice Direction, the courts may issue summons to subpoena witnesses in terms of the rules. Furthermore, witnesses can be issued with summons requiring subpoenaed *ducem tecum*.¹³³

Concerning discovery; England has rules that regulate electronic disclosure of information for purpose of litigation.¹³⁴ Legal representatives must give notice to clients before the actual disclosure takes place.¹³⁵ The case of *Digicel (St Lucia) Limited v Cable & Wireless Plc*¹³⁶ enforced the application of Rule 31 of the Practice Direction. The court affirmed that evidence produced by computers may be used during the discovery process in litigation in compliance with Practice Direction.¹³⁷ Compliance with discovery process was illustrated in the case of *Agents' Mutual Limited v Gascoigne Halman Limited*¹³⁸ where there was an omission made regarding information that should have been disclosed.¹³⁹ The Tribunal forced the party who omitted to disclose to attend to the discovery.¹⁴⁰ Another case confirming the importance of complying with the discovery process is *Omar v Omar*.¹⁴¹ This matter dealt with the administration of a deceased estate.

¹³¹ Rules 1.1 to 2.3 of the Practice Direction 510 – the electronic working pilot scheme.

¹³² Rules 1.1 to 2.3 of the Practice Direction 510 – the electronic working pilot scheme.

¹³³ Rule 34A (1.1) Practice Directions – Deposition and court attendance.

¹³⁴ Rule 7 of the Practice Direction 31B – disclosure of electronic documents.

¹³⁵ Rule 7 of the Practice Direction 31B – disclosure of electronic documents.

¹³⁶ *Digicel (St Lucia) Ltd v Cable & Wireless Plc* 2008 EWHC 2522 (CH).

¹³⁷ *Digicel (St Lucia) Ltd v Cable & Wireless Plc* 2008 EWHC 2522 (CH).

¹³⁸ *Agents' Mutual Limited v Gascoigne Halman Limited Ltd* Case no 1262/5/7/16 Competition Tribunal (T).

¹³⁹ *Agents' Mutual Limited v Gascoigne Halman Limited Ltd* Case no 1262/5/7/16 Competition Tribunal (T).

¹⁴⁰ *Agents' Mutual Limited v Gascoigne Halman Limited Ltd* Case no 1262/5/7/16 Competition Tribunal (T) para 8.

¹⁴¹ *Omar v Omar* Ch 1994 O No 6033 Chancery Division.

The deceased had a mistress,¹⁴² who sought the discovery of bank records.¹⁴³ Information relating to the name of an Irish company (*Coeng Corporation Ltd Inc*) was also sought as part of disclosure.¹⁴⁴ The court held that it was important to discover the information because the estate of the deceased ought to be properly administered and there was a legitimate purpose to discover the documents necessary to the executors of the estate.¹⁴⁵

In *Wallace Smith Trust Co Ltd (in liquidation) v Deloitte Haskins & Sells*,¹⁴⁶ the Court of Appeal affirmed the significance of discovering documents in litigation proceedings.¹⁴⁷

2.3 Comparative analysis

There is no doubt that there are differences in the civil procedure of England and South Africa. The first relates to the processes that commence proceedings. In the UK, the complaint is lodged and the justice of the peace in return issues summons. In South Africa summons is issued by the clerk of the Magistrates Court and the registrar in the High Court.

In England, Rule 7 of Practice Direction enables the claimant to serve the claim form whilst in terms of South African law the sheriffs of the court effect service. England is advanced as far as the use of e-technology is concerned because there are already rules in place that enable parties to issue claim via electronic means.¹⁴⁸

¹⁴² *Omar v Omar* Ch 1994 O No 6033 Chancery Division pages 1428 - 1429.

¹⁴³ *Omar v Omar* Ch 1994 O No 6033 Chancery Division pages 1428 - 1429.

¹⁴⁴ *Omar v Omar* Ch 1994 O No 6033 Chancery Division pages 1428 - 1429.

¹⁴⁵ *Omar v Omar* Ch 1994 O No 6033 Chancery Division pages 1433l.

¹⁴⁶ *Wallace Smith Trust Co Ltd (in liquidation) v Deloitte Haskins & Sells* 1996 Court of Appeal

¹⁴⁷ *Wallace Smith Trust Co Ltd (in liquidation) v Deloitte Haskins & Sells* 1996 Court of Appeal.

The court held that 'The general principles underlying discovery remain those contained in the judgment of the Court of Appeal in the *Penivian Guano Case*, 11 Q.B.D. 55. I have anticipated however, that these principles and the present practice may have to be re-examined in the near future. The scope of discovery in a complex action imposes obligations with regards to the examination and identification of documents which are often extremely expensive properly to fulfil'.

¹⁴⁸ Rule 7 of the Practice Direction 510 – the electronic pilot scheme.

Furthermore, in accordance with the Practice Direction,¹⁴⁹ an official website (data base) has been established that allows parties access to the progress and the status of matters.

This technological advancement can be of substantial benefit to South African civil proceedings. The only similarity relates to discovery of documents used during litigation, as well as subpoenas and subpoena *duces tecum*.¹⁵⁰ The case of *Digicel (St Lucia) Limited v Cable & Wireless Plc*, discussed above, affirms the significance of compliance with the rules of discovery, which is similar to South African rules. If one of the parties refuses to discover necessary documents, that party cannot lead the information he/she refused to disclose.¹⁵¹

Witnesses in England are issued summons to appear before court and in South Africa, witnesses are subpoenaed.¹⁵² Insofar as e-technology is concerned, there is a difference in the content and definitions of the e-technology terms. For example, section 1 of the South Africa ECTA has a specific provision that meticulously defines advanced electronic signature,¹⁵³ data,¹⁵⁴ data messages,¹⁵⁵ data controller,¹⁵⁶ electronic communications, and relevant e-technology terms.¹⁵⁷ The UK Electronic Communications Act is not as detailed as the South African ECTA, and there is no specific provision dealing with relevant e-technology definitions. However, in section 15 of the UK Electronic Communications Act there are some e-technology definitions such as document;¹⁵⁸ communication¹⁵⁹ and electronic communications.¹⁶⁰

¹⁴⁹ Rules 7 of the Practice Direction 510 – the electronic working pilot scheme.

¹⁵⁰ Section 35(1) and (2) of the Superior Courts Act.

¹⁵¹ Rule 35 of the Uniform Court of Rules.

¹⁵² Section 35 of the Superior Courts Act.

¹⁵³ Section 1 of the ECT Act.

¹⁵⁴ Section 1 of the ECT Act.

¹⁵⁵ Section 1 of the ECT Act.

¹⁵⁶ Section 1 of the ECT Act.

¹⁵⁷ Section 1 of the ECT Act.

¹⁵⁸ Section 15 of the UK Electronic Communications Act of 2000.

¹⁵⁹ Section 15 of the UK Electronic Communications Act of 2000.

¹⁶⁰ Section 15 of the UK Electronic Communications Act of 2000.

Unlike the South African ECTA, the content of the UK Electronic Communications Act is different in that it immediately discusses cryptography support services¹⁶¹ and only deals with data,¹⁶² electronic communication,¹⁶³ and electronic signature¹⁶⁴ later in the Act. The South African ECT Act starts with the definitions,¹⁶⁵ followed by electronic transactions policy,¹⁶⁶ legal requirements for data messages,¹⁶⁷ electronic filing.¹⁶⁸ The cryptography service provider¹⁶⁹ is only provided for in section 29 of the ECTA.

The UK Electronic Communications Act has no specific provision for the definition of data. Reference to the word data only appears in section 6(1) of the UK Electronic Communications Act. Even so, data is not specifically defined as per the South African ECTA. Electronic data is only mentioned in the discussion of cryptography support service. Sections 7 and 8 also briefly refer to electronic communications, data, and electronic signatures. Similarly, however the meaning of electronic communication, in terms of section 8(2), requires it to be in writing which is akin to section 12 of the ECTA, which requires a document to be in writing¹⁷⁰ to qualify as data message.¹⁷¹

In section 7 of the UK Electronic Communications Act, there are certain conditions that must be met before an electronic signature is regarded as authentic.¹⁷² Namely, the electronic signature must be inserted into the electronic communication¹⁷³ and must be intended to be used as such in order to qualify as an authentic signature.¹⁷⁴ These conditions are similar to the provisions of section 13 of the South African ECTA which requires the party who inserts such an electronic signature to intend to sign the electronic document in question.¹⁷⁵

¹⁶¹ Section 1 of the UK Electronic Communications Act of 2000.

¹⁶² Sections 6, 7 and 8 of the UK Electronic Communications Act of 2000.

¹⁶³ Sections 6 and 8 of the UK Electronic Communications Act of 2000.

¹⁶⁴ Section 7 of the UK Electronic Communications Act of 2000.

¹⁶⁵ Section 1 of the ECT Act.

¹⁶⁶ Sections 10 of the ECT Act.

¹⁶⁷ Sections 11 to 20 of the ECT Act.

¹⁶⁸ Section 27 of the ECT Act.

¹⁶⁹ Section 29 of the ECT Act.

¹⁷⁰ Section 8(2) of the ECT Act.

¹⁷¹ Section 12 of the ECT Act.

¹⁷² Section 7 of the UK Electronic Communications Act of 2000.

¹⁷³ Section 7(2) of the UK Electronic Communications Act of 2000.

¹⁷⁴ Section 7(2) of the UK Electronic Communications Act of 2000.

¹⁷⁵ Section 13 of the ECT Act.

Protection against disclosure of information in the UK Electronic Communications Act is provided in section 4.¹⁷⁶ This provision is similar to section 42 of RICA because the latter precludes parties from disclosing electronic communication.¹⁷⁷ Section 4 of the UK Electronic Communications Act prevents parties from disclosing confidential information¹⁷⁸ relating to persons and business at large.¹⁷⁹ According to section 4 of the UK Electronic Communications Act, confidential information can only be disclosed when there is consent¹⁸⁰ to such disclosure which is akin to the provisions of section 5 of RICA¹⁸¹ and to some of the provisions of POPI.¹⁸² The UK Electronic Communications Act does not have a specific provision for electronic filing as is the case in section 27 of the South African ECTA.¹⁸³ Instead, electronic filing in the UK is provided in Practice Direction 510.¹⁸⁴ South Africa has not fully implemented all provisions of the ECTA, such as section 27. Therefore, as much as the ECT Act is well documented in South Africa, the UK is more advanced in embracing e-technology as seen from the contents of Practice Direction 510,¹⁸⁵ which created a specific project to use e-technology in civil court proceedings.¹⁸⁶

There is no specific legislation that officially protects privacy of electronic communications¹⁸⁷ or data in the UK as is the case in South Africa. It appears that the protection of privacy is tacitly incorporated in section 4 of the UK Electronic Communications Act, as well as in Practice Direction 31,¹⁸⁸ which deals with disclosure of electronic documents. The tacit or implied protection is similar to section 6(2)(d) of RICA,¹⁸⁹ which deals with implied consent¹⁹⁰ to the disclosure of electronic communications.

¹⁷⁶ Section 4 of the ECT Act.

¹⁷⁷ Section 42 of RICA deals with the prohibition of disclosure of information.

¹⁷⁸ Section 4(1)(b) of the UK Electronic Communications Act.

¹⁷⁹ Section 4(1)(b) of the UK Electronic Communications Act.

¹⁸⁰ Section 4(1)(b) of the UK Electronic Communications Act.

¹⁸¹ Section 5 of RICA provides for interception of communication with consent of party to communication.

¹⁸² Sections 2, 19 – 22 and 26 of POPI.

¹⁸³ Section 27 of the ECT Act deals with acceptance of electronic filing and issuing of documents.

¹⁸⁴ Practice Direction 510 – Electronic working Pilot Scheme.

¹⁸⁵ Practice Direction 510 – Electronic working Pilot Scheme.

¹⁸⁶ Practice Direction 510 – Electronic working Pilot Scheme.

¹⁸⁷ Sections 2, 19 – 22 and 26 of POPI.

¹⁸⁸ Practice Direction 31 – disclosure of electronic documents.

¹⁸⁹ Section 6 of RICA provides for 'interception of indirect communication in connection with carrying on business.

¹⁹⁰ Section 6(2)(d) of RICA.

3. United States of America

3.1 History of Civil Procedure

According to Millar, civil procedure in the United States of America stems from Roman law.¹⁹¹ Williams affirms the law of civil procedure in the United States of America has the same origin as that of England;¹⁹² it stems from common law.¹⁹³ Historically, court decisions were determined by jury.¹⁹⁴ The plaintiff issued a petition served by the sheriff.¹⁹⁵ Service was effected personally at the defendant's last known address.¹⁹⁶ The parties to the proceedings were examined by written interrogatories.¹⁹⁷ The defendant had a right to discover documents, or information necessary for the proceedings.¹⁹⁸

The sheriffs were obliged to prove that they effected the service by filing a certificate of service.¹⁹⁹ In 1753, there was a sanction imposed on sheriffs, if they did not return with a certificate of service.²⁰⁰ In 1827, the petition process was abolished.²⁰¹ It was thus adequate for the parties to issue summons by 1827.²⁰² In 1870, the United States accepted the Code of Civil Procedure.²⁰³

Stiefel and Maxeiner argue that civil procedure in the United States went through a transformation process resulting in many changes.²⁰⁴ The changes started in 1848 when the field code was introduced.²⁰⁵ The second phase of transformation occurred when the United States accepted Federal Rules of Civil Procedure.²⁰⁶

¹⁹¹ Millar WR Three American Ventures in Summary Civil Procedure 1928 *The Yale Law Journal* Vol 4 193 – 224.

¹⁹² Williams *Canadian Civil Procedure* 1-13.

¹⁹³ Williams *Canadian Civil Procedure* 1-13.

¹⁹⁴ Millar 1928 *Yale Law Journal* 193-224.

¹⁹⁵ Millar 1928 *Yale Law Journal* 193-224.

¹⁹⁶ Millar 1928 *Yale Law Journal* 193-224.

¹⁹⁷ Millar 1928 *Yale Law Journal* 193 – 224.

¹⁹⁸ Millar 1928 *Yale Law Journal* 193 – 224.

¹⁹⁹ Millar 1928 *Yale Law Journal* 193 – 224.

²⁰⁰ Millar 1928 *Yale Law Journal* 193 – 224

²⁰¹ Millar 1928 *Yale Law Journal* 193 – 224.

²⁰² Millar 1928 *Yale Law Journal* 193 – 224.

²⁰³ Millar 1928 *Yale Law Journal* 193 – 224.

²⁰⁴ Stiefel EC and Maxeiner JR 'Civil Justice Reform in the United States – opportunity for Learning from Civilized European Procedure Instead of Continued Isolation?' *The American Journal of Comparative Law* 1994 Vol. 42-148.

²⁰⁵ Stiefel and Maxeiner 1994 *The American Journal of Comparative Law* 148.

²⁰⁶ Stiefel and Maxeiner 1994 *The American Journal of Comparative Law* 148.

The French codes and the Louisiana law of civil procedure also influenced the United States of America's civil procedure.²⁰⁷ Subsequently, the Federal Rules of Civil Procedure were introduced in 1938.²⁰⁸ During this period, German civil procedure also played a significant role in influencing the United States of America's civil procedure.²⁰⁹

Scholars like Millar, also contributed to the development of the United States of America's civil procedure, particularly during the period 1920 and 1930.²¹⁰ This resulted in the incorporation of foreign law into the rules of civil procedure and its processes, for example, discovery was introduced.²¹¹

Court documents, such as pleadings were restricted between 1848 and 1938.²¹² Equity jurisdiction was done away with in Federal Courts.²¹³ Federal Courts however accepted equity procedures.²¹⁴ They enforced the notion and principle of fairness.²¹⁵ The Federal rules introduced discovery process that was not limited.²¹⁶ This resulted in the abuse of the process, for example, parties were asked to disclose information not relevant for the purpose of trial or litigation.²¹⁷ The discovery process in the United States of America was heavily influenced by German modes.²¹⁸

Burbank and Siberman indicate that civil proceedings in the United States of America are regulated by the Federal Rules of civil procedure.²¹⁹ The processes in the different courts are managed and regulated by the rules.²²⁰ For example, the rules make it mandatory to discover information necessary for litigation.²²¹

²⁰⁷ Stiefel and Maxeiner 1994 *The American Journal of Comparative Law* 149.

²⁰⁸ Stiefel and Maxeiner 1994 *The American Journal of Comparative Law* 149-155.

²⁰⁹ Stiefel and Maxeiner 1994 *The American Journal of Comparative Law* 149-155.

²¹⁰ Stiefel and Maxeiner 1994 *The American Journal of Comparative Law* 149-155.

²¹¹ Stiefel and Maxeiner 1994 *The American Journal of Comparative Law* 149-155.

²¹² Stiefel and Maxeiner 1994 *The American Journal of Comparative Law* 149-155.

²¹³ Stiefel and Maxeiner 1994 *The American Journal of Comparative Law* 149-155.

²¹⁴ Stiefel and Maxeiner 1994 *The American Journal of Comparative Law* 149-155.

²¹⁵ Stiefel and Maxeiner 1994 *The American Journal of Comparative Law* 149-155.

²¹⁶ Stiefel and Maxeiner 1994 *The American Journal of Comparative Law* 149-155.

²¹⁷ Subrin N Fishing expeditions allowed the historical background of the 1938 Federal Discovery Rules *Boston College Law Review* Vol. 39 691. 704. Subrin states that 'New York allowed for depositions of one's party or any other party'.

²¹⁸ Stiefel and Maxeiner 1994 *The American Journal of Comparative Law* 156 – 162.

²¹⁹ Burbank SB and Siberman L 'Civil Procedure Reform in Comparative Context: The United States of America; 1997 *The American Journal of Comparative Law* Vol.. 45 677- 682.

²²⁰ Burbank and Siberman 1997 *The American Journal of Comparative Law* 677.

²²¹ Burbank and Siberman 1997 *The American Journal of Comparative Law* 677.

The pre-trial phase sets out different stages that must be followed and confirmed before set-down date for the actual trial is confirmed.²²² During this phase, parties exchange documentary evidence as well as witness testimony.²²³ Other documents include pleadings, and various kinds of motion pertinent in practice.²²⁴

Pleadings in the USA are referred to as statement of claim as opposed to the South African rules,²²⁵ which regards court papers as pleadings.²²⁶ There is an advisory committee that considers and reviews rules when necessary.²²⁷ According to Burbank and Siberman, Rule 11 recognises satellite litigation.²²⁸ This has been the case since 1983.²²⁹ Rule 11 obliges lawyers to act in good faith when signing and filing court documents.²³⁰ The two scholars also refer to Rule 26(g) of the Federal Courts Rules, which regulate discovery process.²³¹

This rule forces attorneys to sign papers or discovery request documents.²³² Civil Justice Reform Act of 1990 compels the districts to draft rules relating to civil procedure.²³³

In 1993, Federal Rules forced parties to disclose information regarded as core information, which relates to facts significant to the case.²³⁴ The rules also enabled the use of interrogatories to secure evidence before the court.²³⁵

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- ²²² Burbank SB and Siberman L 1997 *The American Journal of Comparative Law* 677. The examples of the pre-trial processes according to Nesson are 'the complaint is lodged; this is followed by statement of claim; parties are for discovery in terms of rules 26 of the Federal Rules of Civil Procedure. Nesson C Pretrial Procedure <http://www.havard.ed/nesson/reading-pre-trialProcedures.pdf> (Date of use: 24 March 2018)
- ²²³ Burbank and Siberman 1997 *The American Journal of Comparative Law* 677.
- ²²⁴ Burbank and Siberman 1997 *The American Journal of Comparative Law* 677 -704.
- ²²⁵ Rule 18 of the Uniform Rules of Court and Rules 15; 16 and 19 of the Magistrates' Court Rules.
- ²²⁶ Burbank and Siberman 1997 *The American Journal of Comparative Law* 678 -704.
- ²²⁷ Burbank and Siberman 1997 *The American Journal of Comparative Law* 678 -704.
- ²²⁸ Burbank and Siberman 1997 *The American Journal of Comparative Law* 678 - 704.
- ²²⁹ Burbank and Siberman 1997 *The American Journal of Comparative Law* 678 - 704.
- ²³⁰ Burbank and Siberman 1997 *The American Journal of Comparative Law* 678 - 704.
- ²³¹ Burbank and Siberman 1997 *The American Journal of Comparative Law* 678 - 704.
- ²³² Burbank and Siberman 1997 *The American Journal of Comparative Law* 678 – 704.
- ²³³ Burbank and Siberman 1997 *The American Journal of Comparative Law* 678 – 704.
- ²³⁴ Burbank and Siberman 1997 *The American Journal of Comparative Law* 678 – 704; According to Shah core information is 'information relevant to disputed facts alleged with Particularity in the pleadings. Shah Shilpa 1995 An application of Federal Rules of Civil Procedure of Civil Procedure 26(A)(1) to section 1983 Actions: Does Rule 26A(1) Violate the Rules Enabling Act. <http://engagedscholarship.csuohio.ed/clevstlrev> (Date of use: 24 March 2018)
- ²³⁵ Burbank and Siberman 1997 *The American Journal of Comparative Law* 678 – 704.

Two scholars²³⁶ further confirm the significance of the application of Rule 16 that regulates the control and scheduling of discovery and restrictions²³⁷ on expert evidence.²³⁸ The rules also compels parties to provide or submit additional disclosure.²³⁹ The two writers also refer to the sanctions imposed in Rule 11 of the Federal Rules of the Court.²⁴⁰ These rules are discussed later in the chapter.

According to Yeazell, there are four sources of law of civil procedure in the United States.²⁴¹ The first source is the Constitution of the United States.²⁴² The Federal Rules of Civil and Appellate Procedure follow.²⁴³ A Judicial Code is collected in Title 28 of the United States Code.²⁴⁴ The principle of judicial precedent also applies in the United States; thus, case law is also regarded as one of the sources of law.²⁴⁵

Civil proceedings are regulated by the Federal Rules of Civil Procedure.²⁴⁶ The Federal rules are passed in terms of the Rules Enabling Act of 1934.²⁴⁷ The Rules Enabling Act confers powers on the Supreme Court to draft and pass rules of civil procedure.²⁴⁸ A committee that drafts these rules.²⁴⁹ Judges do not *per se* draft the rules; the drafting process is the responsibility of the committee.²⁵⁰ Judges apply the law.²⁵¹ A Judicial Conference is regarded as an additional committee.²⁵² The original rules were rules passed in 1938.²⁵³ These rules went through changes and transformation and this went on up until 2005.²⁵⁴

²³⁶ Burbank and Siberman 1997 *The American Journal of Comparative Law* 678 – 704.

²³⁷ Burbank and Siberman 1997 *The American Journal of Comparative Law* 678 – 704.

²³⁸ Burbank and Siberman 1997 *The American Journal of Comparative Law* 678 – 704.

²³⁹ Burbank and Siberman 1997 *The American Journal of Comparative Law* 678 – 704.

²⁴⁰ Burbank and Siberman 1997 *The American Journal of Comparative Law* 701 – 704.

²⁴¹ Yeazell S and Schwartz JC *Federal Rules of Civil Procedure* (Aspen 2006) xi.

²⁴² Yeazell S and Schwartz JC *Federal Rules of Civil Procedure* xi.

²⁴³ Yeazell S and Schwartz JC *Federal Rules of Civil Procedure* xi.

²⁴⁴ Yeazell S and Schwartz JC *Federal Rules of Civil Procedure* xi.

²⁴⁵ Yeazell S and Schwartz JC *Federal Rules of Civil Procedure* xi.

²⁴⁶ Yeazell S and Schwartz JC *Federal Rules of Civil Procedure* xiii.

²⁴⁷ Yeazell S and Schwartz JC *Federal Rules of Civil Procedure* xiii.

²⁴⁸ Yeazell S and Schwartz JC *Federal Rules of Civil Procedure* xiii.

²⁴⁹ Yeazell S and Schwartz JC *Federal Rules of Civil Procedure* xiii.

²⁵⁰ Yeazell S and Schwartz JC *Federal Rules of Civil Procedure* xiii.

²⁵¹ Yeazell S and Schwartz JC *Federal Rules of Civil Procedure* xiii.

²⁵² Yeazell S and Schwartz JC *Federal Rules of Civil Procedure* xiii.

²⁵³ Yeazell S and Schwartz JC *Federal Rules of Civil Procedure* xiii.

²⁵⁴ Yeazell S and Schwartz JC *Federal Rules of Civil Procedure* xiii.

3.2 Structure of the courts

It is important to understand the US structure so that one has knowledge of the jurisdiction the different courts have, as is the case in the South African court structures and entrenched in section 166 of the Constitution.²⁵⁵

The highest court in the United States of America is the Supreme Court.²⁵⁶ This court was established in terms of the Constitution.²⁵⁷

The United States Congress established the lower courts.²⁵⁸ There are 94 districts in the United States of America. Furthermore, there are 13 courts of appeals and these hear appeals from lower courts.²⁵⁹ They are presided over by judges²⁶⁰ and there is no jury system in these courts.²⁶¹ There are district courts presided over by judges and a jury.²⁶² There are also magistrate judges who preside in these courts.²⁶³ These are regulated by the Federal Rules of Civil Procedure for the United States Districts Courts.²⁶⁴

²⁵⁵ Section 166 of the Constitution of the Republic of South Africa, 1996.

²⁵⁶ Court Role and Structure Unlimited States Courts
<http://www.uscourts.gov/about-federal-courts/court-role-and-structure>
(Date of use: 12 December 2017)

²⁵⁷ Court Role and Structure Unlimited States Courts
<http://www.uscourts.gov/about-federal-courts/court-role-and-structure>
(Date of use: 12 December 2017).

²⁵⁸ Court Role and Structure Unlimited States Courts
<http://www.uscourts.gov/about-federal-courts/court-role-and-structure>
(Date of use: 12 December 2017).

²⁵⁹ Court Role and Structure Unlimited States Courts
<http://www.uscourts.gov/about-federal-courts/court-role-and-structure>
(Date of use: 12 December 2017).

²⁶⁰ Court Role and Structure Unlimited States Courts
<http://www.uscourts.gov/about-federal-courts/court-role-and-structure>
(Date of use: 12 December 2017).

²⁶¹ Court Role and Structure Unlimited States Courts
<http://www.uscourts.gov/about-federal-courts/court-role-and-structure>
(Date of use: 12 December 2017).

²⁶² Court Role and Structure Unlimited States Courts
<http://www.uscourts.gov/about-federal-courts/court-role-and-structure>
(Date of use: 12 December 2017).

²⁶³ Court Role and Structure Unlimited States Courts
<http://www.uscourts.gov/about-federal-courts/court-role-and-structure>
(Date of use: 12 December 2017).

²⁶⁴ Yeazell S and Schwartz JC *Federal Rules of Civil Procedure* 3.

There are also Courts of Federal Claims that have jurisdiction to determine claims sounding in money against the government.²⁶⁵

There are also Bankruptcy Courts that have powers to decide on personal and business bankruptcy matters.²⁶⁶ Lastly, there are article 1 courts that have limited jurisdiction insofar as judicial power is concerned.²⁶⁷ It is now important to discuss the relevant statutes applied in civil procedure before discussing the rules.

3.3 Civil Discovery Act 2015

This Act was passed to regulate the process of discovery in civil proceedings.²⁶⁸ It enables parties to use e-technology during the discovery process.²⁶⁹ It also regulates the extent and the volume of documents discovered.²⁷⁰ The Act also aims at promoting privacy rights.²⁷¹ The relevant sections of this Act are discussed below.

²⁶⁵ Court Role and Structure Unlimited States Courts
<http://www.uscourts.gov/about-federal-courts/court-role-and-structure>
(Date of use: 12 December 2017). Rule 26(1)(A) of the Federal Rules of Civil Procedure states: '...In General except as exempted by rule 26(a)(1)(B) or as otherwise stipulated or ordered by the court, a party must without awaiting a discovery request, provide to the other parties:

- (i) the name and, if known the address and telephone number of each individual likely to have discoverable information – the disclosing party may use support its claims or defences, unless the use would be solely for impeachment;
- (ii) a copy – or a description by category and location – all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defences, unless the use would solely for impeachment;
- (iii) a copy – or a description by category and location, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defences, unless the use would be solely for impeachment;
- (iv) a computation of each category of damages claimed by disclosing party – who must also make available for inspection and copying as under rule 34 the documents or other evidentiary material, unless privileged or protected from disclosure on which each computation is based, including materials bearing on the nature and extent of injuries suffered; and
- (v) for inspection and copying or under rule 34, any insurance business may be liable to satisfy all or part of a possible judgment in the action or the indemnity or re-imburse for payments made to satisfy the judgment...'.

²⁶⁶ Court Role and Structure Unlimited States Courts
<http://www.uscourts.gov/about-federal-courts/court-role-and-structure>
(Date of use: 12 December 2017).

²⁶⁷ Court Role and Structure Unlimited States Courts
<http://www.uscourts.gov/about-federal-courts/court-role-and-structure>
(Date of use: 12 December 2017).

²⁶⁸ Sections 2016.020; 2017.010; 2017.020; 2030.010 of the Civil Discovery Act of 2015 [Hereinafter referred to as the Civil Discovery Act].

²⁶⁹ Section 2016.020 and 2017.010 of the Civil Discovery Act.

²⁷⁰ Section 2017.020 of the Civil Discovery Act.

²⁷¹ Section 2018.020 of the Civil Discovery Act.

Section 2016.020 of the Act provides that parties may discover documents necessary for proceedings through digital or electronic communication.²⁷² Section 2017.010 facilitates the use of electronic discovery of documents.²⁷³ Parties may obtain the identity and description of the information through electronic communication and this reinforces the process of discovery as contained in the rules, particularly rule 26.²⁷⁴

Section 2017.020 confirms the discretion conferred on the courts in terms of the rules.²⁷⁵ This is expanded to the extent that it determines the burden, expense, intrusiveness of that discovery²⁷⁶ and the volume of the evidence that ought or not be discovered.²⁷⁷ Section 2017.210 provides for specific discovery processes, which relate to insurance²⁷⁸ agreements and indemnity agreements.²⁷⁹

Section 2018.020 enforces the client's rights to privacy concerning personal information.²⁸⁰ Section 2018.060 states that attorneys may ask the court to grant an order to conduct the hearing in-camera.²⁸¹ Section 2018.080 protects attorney-client privilege enforced in terms of common law.²⁸² The Act also illustrates different methods of discovery.²⁸³ For example, parties may discover through oral and written depositions.²⁸⁴ The Act also permits parties to discover through interrogatories²⁸⁵ and inspection of documents.²⁸⁶

²⁷² Section 2016.020 defines electronic as:
'Electronic means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities'.

²⁷³ Section 2017.010 of the Civil Discovery Act.

²⁷⁴ Section 2017.010 of the Civil Discovery Act.

²⁷⁵ Section 2017.020 of the Civil Discovery Act.

²⁷⁶ Section 2017.020 (a) of the Civil Discovery Act.

²⁷⁷ Section 2017.020 of the Civil Discovery Act.

²⁷⁸ Section 2017.210 of the Civil Discovery Act.

²⁷⁹ Section 2017.210 of the Civil Discovery Act.

²⁸⁰ Section 2018.020 of the Civil Discovery Act.

²⁸¹ Section 2018.060 of the Civil Discovery Act.

²⁸² Section 2018.080 of the Civil Discovery Act.

²⁸³ Section 2019.010 of the Civil Discovery Act.

²⁸⁴ Section 2019.010 of the Civil Discovery Act.

²⁸⁵ Section 2019.010 of the Civil Discovery Act.

²⁸⁶ Section 2019.010 of the Civil Discovery Act.

The parties may exchange information relating to expert witnesses testifying at trial.²⁸⁷ Another section pertinent to this research is section 20130.010, which requires the parties to use written interrogatories during the discovery process.²⁸⁸

It is significant to now discuss the Federal Rules of Court which regulate the operation and the functioning of the respective courts.

3.4 Federal Rules of Civil Procedure of 2016

The rules were passed on 1 December 2016 to facilitate and regulate court processes²⁸⁹ and to provide for a procedure to affect respective processes such as service, subpoenas and so forth.²⁹⁰

The rules affirm the position of the Supreme Court regarding its obligation to pass the rules of the courts.²⁹¹ The rules also confirm the role played by the judicial conference in ensuring that the latter is published.²⁹²

Rule 1 compels the courts to apply the rules before the trial, during the trial and after the trial.²⁹³ Rule 3 provides that the proceedings commence by lodging a claim to court.²⁹⁴ The complaint is presented to the clerk of the court and is subsequently filed.²⁹⁵ This is followed by issuing of summons by the clerk of the court.²⁹⁶ The plaintiff must serve the summons as well as the complaint on the defendant.²⁹⁷ The rules illustrate that the summons must be meticulous in that it should inform the defendant of all relevant facts to enable the defendant to raise a defence.²⁹⁸ The manner of service is also provided in the rules.

²⁸⁷ Section 2019.010 of the Civil Discovery Act.

²⁸⁸ Section 2019.010 of the Civil Discovery Act.

²⁸⁹ Rule 1 of the Federal Rules of Civil Procedure.

²⁹⁰ Rules 1 -70 of the Federal Rules of Civil Procedure.

²⁹¹ Rule 2072 of the Federal Rules of Civil Procedure.

²⁹² Rule 20173 of the Federal Rules of Civil Procedure.

²⁹³ Rule 1 of the Federal Rules of Civil Procedure.

²⁹⁴ Rule 3 of the Federal Rules of Civil Procedure.

²⁹⁵ Rule 3 of the Federal Rules of Civil Procedure.

²⁹⁶ Rule 4 of the Federal Rules of Civil Procedure.

²⁹⁷ Rule 4(2) of the Federal Rules of Civil Procedure.

²⁹⁸ Rule 4 of the Federal Rules of Civil Procedure.

Thus, any person who is above the age of 18 may serve the summons and the necessary pleadings.²⁹⁹ The rules state that service can also be effected by the marshal and deputy marshal of the court.³⁰⁰ There is an additional requirement that is not available in South African civil proceedings; the plaintiff must notify the defendant that the proceedings against him/her have commenced.³⁰¹

At the same time the plaintiff must request the defendant to file for a waiver as required by Rule 4.³⁰² If waiver is filed, there is no need to supply proof of service when a person other than the marshal effected service.³⁰³ Rule 4 enables the parties to serve parties outside the United States of America.³⁰⁴ Proof of service must be filed by commissioning an affidavit that confirms that service was effected.³⁰⁵ Rule 4 requires the marshal who served the court document to present an affidavit.³⁰⁶

The service of discovery documents is contained in Rule 5 and describes the manner in which this process should be followed.³⁰⁷ Namely, the parties may serve personally.³⁰⁸ If this is not possible, it must be done at the place of residence or place of work of the defendant.³⁰⁹ The rule also enables the parties to effect service by using electronic means of communication.³¹⁰ The marshal is obliged to prove return of service by filing a certificate of service.³¹¹ Rule 5 also permits the parties to file court documents through electronic means.³¹²

There is a proviso however, that the standards set out by the judicial conference, regarding the use of electronic communication or e-technology be adhered to.³¹³

²⁹⁹ Rule 4(2) (c) (2) of the Federal Rules of Civil Procedure.

³⁰⁰ Rule 4(2) (c) (3) of the Federal Rules of Civil Procedure.

³⁰¹ Rule 4(2)(d) of the Federal Rules of Civil Procedure.

³⁰² Rule 4(2)(d) of the Federal Rules of Civil Procedure.

³⁰³ Rule 4 (2) of the Federal Rules of Civil Procedure.

³⁰⁴ Rule 4(2) of the Federal Rules of Civil Procedure.

³⁰⁵ Rule 4(2) of the Federal Rules of Civil Procedure.

³⁰⁶ Rule 4(2) of the Federal Rules of Civil Procedure.

³⁰⁷ Rule 5 (2) (c) of the Federal Rules of Civil Procedure.

³⁰⁸ Rule 5(2) of the Federal Rules of Civil Procedure.

³⁰⁹ Rule 5(2) of the Federal Rules of Civil Procedure.

³¹⁰ Rule 5(2) of the Federal Rules of Civil Procedure.

³¹¹ Rule 5.1(d) of the Federal Rules of Civil Procedure.

³¹² Rule 5.1(3) of the Federal Rules of Civil Procedure.

³¹³ Rule 5.1(3) of the Federal Rules of Civil Procedure.

For example, the parties are strictly required to protect the privacy of those who are party to such electronic communication.³¹⁴

This is achieved by referring to the last 4 digits of the identity document, for example, there is no need to write out the whole number.³¹⁵

Rule 7 describes what constitutes pleadings of the court.³¹⁶ These are a complaint,³¹⁷ an answer to the complaint,³¹⁸ counterclaim,³¹⁹ and third-party complaints.³²⁰ According to the rules the pleadings must be signed by the parties' legal representatives or the party concerned.³²¹ The parties in terms of the rules are obliged to plead all the facts that confirm the cause of action.³²²

These rules were illustrated in the case of *USHA Holding LLC and Atul Bhatara v Franchise India Holdings Limited and Gaurav Marys*.³²³ Fraud regarding the court's jurisdiction was committed.³²⁴ The parties were *lured* into the court's jurisdiction, meaning that there was misrepresentation of the facts that established the cause of action.³²⁵ The court ordered that the Plaintiff was entitled to special damages and the conduct of the Defendant was found to be absurd.³²⁶

Rule 16 provides for the facilitation of the pre-trial conference to enable the parties to narrow down the issues and eliminate unnecessary evidence.³²⁷

³¹⁴ Rule 5.1(3) of the Federal Rules of Civil Procedure.

³¹⁵ Rule 5.2 of the Federal Rules of Civil Procedure.

³¹⁶ Rule 7 of the Federal Rules of Civil Procedure.

³¹⁷ Rule 7 of the Federal Rules of Civil Procedure.

³¹⁸ Rule 7 of the Federal Rules of Civil Procedure.

³¹⁹ Rule 7 of the Federal Rules of Civil Procedure.

³²⁰ Rule 7 of the Federal Rules of Civil Procedure.

³²¹ Rule 11 of the Federal Rules of Civil Procedure.

³²² Rule 12 of the Federal Rules of Civil Procedure.

³²³ *USHA Holdings LLC and Atul Bhatara v Franchise India Holdings Limited and Gaurav Marys* 2014 11F.Supp.3rd 244 United District Court.

³²⁴ *USHA Holdings LLC and Atul Bhatara v Franchise India Holdings Limited and Gaurav Marys* 2014 11F.Supp.3rd 244 United District Court.

³²⁵ *USHA Holdings LLC and Atul Bhatara v Franchise India Holdings Limited and Gaurav Marys* 2014 11F.Supp.3rd 244 United District Court.

³²⁶ *USHA Holdings LLC and Atul Bhatara v Franchise India Holdings Limited and Gaurav Marys* 2014 11F.Supp.3rd 244 United District Court.

³²⁷ Rule 16 of the Federal Rules of Civil Procedure.

Rule 26 provides for the discovery process,³²⁸ which includes notice that must be issued to the party who is requested to discover.³²⁹ Rule 26 indicates that the scope of discovery is only limited to the information relevant for the trial or litigation.³³⁰ Rule 26 also recognises the use of e-technology in the process of complying with the discovery request.³³¹ This is however limited insofar as electronically stored information to protect and promote privacy.³³² Gilliom analysed Rules 26 and 37 respectively.³³³ This writer avers that the right to a jury is confirmed in the Federal Rules of Civil Procedure in the District Courts of the United States of America.³³⁴

Rule 30 deals with deposition by oral examination and this may be conducted without order of the court.³³⁵ Parties may also be subpoenaed during this process.³³⁶ They can also be required to produce necessary material or documents.³³⁷ Rule 31 provides for depositions by written questions.³³⁸ This process may be conducted without obtaining a court order.³³⁹ Rule 31 also provides for the process of issuing subpoenas to facilitate deposition.³⁴⁰ Rule 33 confirms that interrogatories may be used and served.³⁴¹ There is however, a limit, thus, parties are limited to 25 written questions.³⁴²

In terms of Rule 34 parties are obliged to produce documents that are electronically stored.³⁴³ The Rule further requires that information stored during the process of conducting business must also be produced.³⁴⁴

³²⁸ Rule 26 of the Federal Rules of Civil Procedure.

³²⁹ Rule 26(1)(A) of the Federal Rules of Civil Procedure.

³³⁰ Rule 26(2) of the Federal Rules of Civil Procedure.

³³¹ Rule 26(3) of the Federal Rules of Civil Procedure.

³³² Rule 26(3) of the Federal Rules of Civil Procedure.

³³³ Gilliom A Rules for Civil Procedure in the United States District Courts: Trial Procedure 1938 *Indiana Law Journal* Vol. 14 issue 2 160 -162.

³³⁴ Gilliom 1938 *Indiana Law journal* 160 - 162.

³³⁵ Rule 30 of the Federal Rules of Civil Procedure.

³³⁶ Rule 30 of the Federal Rules of Civil Procedure.

³³⁷ Rule 30 of the Federal Rules of Civil Procedure.

³³⁸ Rule 31 of the Federal Rules of Civil Procedure.

³³⁹ Rule 31 of the Federal Rules of Civil Procedure.

³⁴⁰ Rule 31 of the Federal Rules of Civil Procedure.

³⁴¹ Rule 33 of the Federal Rules of Civil Procedure.

³⁴² Rule 33 of the Federal Rules of Civil Procedure.

³⁴³ Rule 34 of the Federal Rules of Civil Procedure.

³⁴⁴ Rule 34 of the Federal Rules of Civil Procedure.

The application of Rule 34 was demonstrated in *Societe Nationale Industrielle Aerospatiale et al v United States District of Iowa*.³⁴⁵ In this case, there was a request for discovery of further material after the initial process was complied with.³⁴⁶ The request was followed by a protective order.³⁴⁷ The magistrate had refused to grant the motion concerning interrogatories. The Supreme Court held that “*the Magistrates and the Court of Appeals correctly refused to grant the broad protective order that petitioners requested*”.³⁴⁸

In *Seattle Times Co. DBA The Seattle Times et al v Rhinehart et al*,³⁴⁹ the court was confronted with a defamation of character case regarding unusual religious practices by the foundation.³⁵⁰ These were subsequently published and reference was made to the fact the foundation could communicate with a deceased person.³⁵¹ The Foundation filed for a protective order and the court applied and interpreted the rules, particularly Rule 26 and 37 respectively.³⁵² The court held that although the rules do not expressly protect the right to privacy, “*...such matters are implied in the broad purpose and language of the rule*”.³⁵³

Rule 38 affirms the right to a jury.³⁵⁴ This takes place upon demand by the party who wishes to have a trial jury.³⁵⁵

³⁴⁵ *Societe Nationale Industrielle Aerospatiale et al v United States District of Iowa* 1987 432 U.S. 522 Supreme Court of the United States.

³⁴⁶ *Societe Nationale Industrielle Aerospatiale et al v United States District of Iowa* 1987 432 U.S. 522 Supreme Court of the United States.

³⁴⁷ *Societe Nationale Industrielle Aerospatiale et al v United States District of Iowa* 1987 432 U.S. 522 Supreme Court of the United States.

³⁴⁸ *Societe Nationale Industrielle Aerospatiale et al v United States District of Iowa* 1987 432 U.S. 522 Supreme Court of the United States para 23.

³⁴⁹ *Seattle Times Co. DBA The Seattle Times et al v Rhinehart et al* 1984 467 US 20.

³⁵⁰ *Seattle Times Co. DBA The Seattle Times et al v Rhinehart et al* 1984 467 US 20. Rule 26 is stated and articulated in footnote 228. Rule 37 of the Federal Rules of Civil Procedure states: ‘... (a) Motion for an order compelling disclosure of discovery –

(1) In General – On notice to the other parties and all affected persons, a party may move for an order compelling disclosure or discovery. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action...’

³⁵¹ *Seattle Times Co. DBA The Seattle Times et al v Rhinehart et al* 1984 467 US 20.

³⁵² *Seattle Times Co. DBA The Seattle Times et al v Rhinehart et al* 1984 467 US 20.

³⁵³ *Seattle Times Co. DBA The Seattle Times et al v Rhinehart et al* 1984 467 US 20.

³⁵⁴ Rule 38 of the Federal Rules of Civil Procedure.

³⁵⁵ Rule 38 of the Federal Rules of Civil Procedure.

If there is no demand, the court will decide on the trial in terms of Rule 39.³⁵⁶ The judge will sit and determine the outcome of the matter.³⁵⁷ If parties do not disclose, as per discovery request, there is a sanction that may be imposed against such party.³⁵⁸ Rule 45 provides that parties may be subpoenaed to testify during the trial or subpoena *duces tecum* may be issued.³⁵⁹

The burden of proof is placed on the plaintiff and the common law principle that *he who alleges must prove* is enforced in Rule 301.³⁶⁰ It is important to note that the rules in the district courts are similar to the Federal Rules of Civil Procedure.³⁶¹ The numbers of the rules are the same as per the Federal Rules of Civil Procedure passed by the Supreme Court. For example, Rule 4 of the District Courts Federal Rules of Civil Procedure relates to the manner of service as contained in the Supreme Court Rules.³⁶² They shall therefore not be discussed any further.

³⁵⁶ Rule 39 of the Federal Rules of Civil Procedure. Rule 39(a) states that ‘...When a demand is made. When a jury trial has been demanded under rule 38, the action must be designated on the docket as a jury action. The trial on all issues so demanded must be jury unless;
(1) the party parties or their attorneys file a stipulation to a non-jury trial or so stipulate on the record; or
(2) the court, on motion or on its own finds that on some or all of those issues there is no federal right to a jury trial.
(b)When no demand is made. Issues on which a jury trial is not properly demanded are to be tried by the court. But the court may, on motion, order a jury trial on any issues for which a jury might have been demanded
(c) Advisory jury; jury trial by consent. In an action not triable of right by a jury, the court, on motion or on its own;
(1) may try any issues with an advisory jury; or
(2) may issue by a jury whose verdict has the same effect as if a jury trial had been a matter of right, unless the action is against the United States and a federal statute provides for a nonjury trial...’

³⁵⁷ Rule 39 of the Federal Rules of Civil Procedure.

³⁵⁸ Rule 37 of the Federal Rules of Civil Procedure

³⁵⁹ Rule 45 of the Federal Rules of Civil Procedure.

³⁶⁰ Rule 301 of the Federal Rules of Civil Procedure.

³⁶¹ Yeazell S and Schwartz JC *Federal Rules of Civil Procedure* 14- 113.

³⁶² Yeazell S and Schwartz JC *Federal Rules of Civil Procedure* 14 – 113.

3.5 Electronic Communications Privacy Act of 1986

The purpose of this Act is to regulate electronic communication.³⁶³ It was also passed to protect the privacy of personal information.³⁶⁴ This relates to information generated, stored, and distributed by computer or e-technology digital instrument.³⁶⁵ The Act was also promulgated to review the law relating to wiretapping and eavesdropping.³⁶⁶

The Act is not voluminous as the South African ECTA. The relevant sections in this regard are sections 2511,³⁶⁷ section 2520³⁶⁸ and section 2511³⁶⁹ respectively.

Section 2510 defines electronic communication to include writing, data, and electromagnetic information.³⁷⁰

³⁶³ Mulligan DK 'Reasonable Expectations in Electronic Communications Privacy Act' 2004 *The George Washington Law Review* 2004 Vol. 72 1557 – 1598; Burnside RS 'The Electronic Communications Privacy Act of 1986: The challenge of applying ambiguous Statutory Language to Intricate Telecommunication Technologies' 1987 *Rutgers Computer & Technology Law Journal* Vol. 13 452 – 515; Rabel TR 'The Electronic Communications and Privacy Act: Discriminatory Treatment for Similar Technology, Cutting the Cord Privacy' 1990 *The John Marshall Law Review* 661 – 681; Kerr OS 'The Next Generation Communications Privacy Act' 2014 *University of Pennsylvania Law Review* 373 – 41; Winters S 'The New Privacy Interest; Electronic Mail in the Workplace' 1993 *Berkeley Technology Law Journal* Vol. 8 197 -233 and Epic.org Electronic Privacy Information Center <http://www.epic.org/privacy/epic/> (Date of use: 12 December 2017).

³⁶⁴ Mulligan 2004 *The George Washington Law Review* 2004 72 1557 – 1598; Burnside 1987 *Rutgers Computer & Technology Law Journal* 13 452 – 515; Rabel 1990 *The John Marshall Law Review* 661 – 681; Kerr 2014 *University of Pennsylvania Law Review* 373 – 41; Winters 1993 *Berkeley Technology Law Journal* 8 197 -233 and Epic.org Electronic Privacy Information Center <http://www.epic.org/privacy/epic/> Date of use: 12 December 2017.

³⁶⁵ Mulligan 2004 *The George Washington Law Review* 2004 72 1557 – 1598; Burnside 1987 *Rutgers Computer & Technology Law Journal* 13 452 – 515; Rabel 1990 *The John Marshall Law Review* 661 – 681; Kerr 2014 *University of Pennsylvania Law Review* 373 – 41; and Epic.org Electronic Privacy Information Center <http://www.epic.org/privacy/epic/> Date of use: 12 December 2017.

³⁶⁶ Mulligan 2004 *The George Washington Law Review* 2004 72 1557 – 1598; Burnside 1987 *Rutgers Computer & Technology Law Journal* 13 452 – 515; Rabel 1990 *The John Marshall Law Review* 661 – 681; Kerr 2014 *University of Pennsylvania Law Review* 373 – 41; and Epic.org Electronic Privacy Information Center <http://www.epic.org/privacy/epic/> Date of use: 12 December 2017.

³⁶⁷ Section 2511 deals with the prohibition of interception and disclosure of wire, oral or Electronic Communications and Burnside 1987 *Rutgers Computer & Technology Law Journal* Vol. 13 452 – 51.

³⁶⁸ Section 2520 authorizes recovery of civil proceedings.

³⁶⁹ Section 2511 requires consent from the parties' consent before the interception of electronic communication takes place.

³⁷⁰ Section 2510 (2) states: '... Electronic communication means any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photo electronic or photo optical system that affects interstate or foreign commerce, but does not include –
(A) Any wire or oral communication;

The Court of Appeal endorsed the protection of privacy in *Konop v Hawaiian Airlines Inc.*³⁷¹ An employee brought a claim against his employer after the latter accessed his private website without the employee's permission or authority.³⁷² The court applied the Electronic Communications Privacy Act. The Act put emphasis on the protection of the right to privacy and affirmed that privacy deserved to be preserved in this case and found in favour of the employee.³⁷³

In *Quon v Arch Wireless Operating Co. Inc.*,³⁷⁴ the court had to decide whether there was an invasion of privacy when the subscriber released text messages.³⁷⁵ The court made a distinction between e-mails and text messages.³⁷⁶ It held there was no difference between these, because a service provider stores them both.³⁷⁷ Kerr argues that privacy should be enforced in internet, Facebook messages, and cell phones.³⁷⁸ In applying the Electronic Communications Privacy Act, the court found that both text messages and e-mails fell within the scope of the privacy protection that is preserved by the Fourth Amendment.³⁷⁹ Therefore, according to the court, there was indeed a violation of the right to privacy.³⁸⁰

(B) Any communication made through a tone - only paging device, or
(C) Any communication from a tracking device as defined in section 3117 of this article'.

³⁷¹ *Konop v Hawaiian Airlines Inc.* 2002 302 F3d 868 Court of Appeals.

³⁷² *Konop v Hawaiian Airlines Inc.* 2002 302 F3d 868 Court of Appeals.

³⁷³ *Konop v Hawaiian Airlines Inc.* 2002 302 F3d 868 Court of Appeals.

³⁷⁴ *Quon v Arch Wireless Operating Co. Inc* 2008 527 F3d 892 Court of Appeals and Kerr 2014 *University of Pennsylvania Law Review* 373 – 41.

³⁷⁵ *Quon v Arch Wireless Operating Co. Inc* 2008 527 F3d 892 Court of Appeal and Kerr 2014 *University of Pennsylvania Law Review* 373 – 41.

³⁷⁶ *Quon v Arch Wireless Operating Co. Inc* 2008 527 F3d 892 Court of Appeals and Kerr 2014 *University of Pennsylvania Law Review* 373 – 41.

³⁷⁷ *Quon v Arch Wireless Operating Co. Inc* 2008 527 F3d 892 Court of Appeals and Kerr 2014 *University of Pennsylvania Law Review* 373 – 41.

³⁷⁸ Kerr 2014 *University of Pennsylvania Law Review* 373 – 41.

³⁷⁹ *Quon v Arch Wireless Operating Co. Inc* 2008 527 F3d 892 Court of Appeals and Kerr 2014 *University of Pennsylvania Law Review* 373 – 41.

³⁸⁰ *Quon v Arch Wireless Operating Co. Inc* 2008 527 F3d 892 Court of Appeals and Kerr 2014 *University of Pennsylvania Law Review* 373 – 41.

3.6 Comparative analysis

It is significant that the origin of civil procedure in the United States of America³⁸¹ is similar to South African law. South African law stems from Roman law and common law.³⁸²

It is interesting however that unlike South African civil procedure, the United States of America's civil statutes do not have specific statutes that regulate each court like South African courts do. The statutes that are important are the Rules Enabling Act and the Civil Discovery Act and even so, the Rules Enabling Act only refers to the passing of the Federal Rules of Civil Procedure.³⁸³

South Africa on the other hand has statutes such as Superior Courts Act, Magistrates' Courts Act, Small Claims Courts' Act, and the Constitutional Amendment Act of 2012. These specifically regulate proceedings in the lower and the higher courts. The rules are added sources of civil procedure, which regulate court proceedings in South Africa.

The United States Federal Rules of Civil Procedure are similar to the South African Uniform Rules of Court and the Magistrates' Court Rules. For example, the manner in which service ought to be affected is similar. Both jurisdictions require personal service or service at the place of residence or place of work; or business and they allow service by means of electronic communications.³⁸⁴ South African statutes and rules do not require the plaintiff to notify the defendant that the proceedings have commenced, as it is the case in the USA.

In terms of South African rules, after the summons is issued, the defendant files a notice³⁸⁵ to defend the matter. In application proceedings, the respondent files a notice to oppose³⁸⁶ the proceedings. The return of service is required in both jurisdictions.

³⁸¹ Watson Borins and Williams *Canadian Civil Procedure* 1-13.

³⁸² Tetley W *Mixed Jurisdiction: Common Law v Civil Law* (Codified and uncoded) *Louisiana Law Review* 694-696.

³⁸³ Yeazell S and Schwartz *JC Federal Courts Rules of Civil Procedure* xi-xv; 3-275.

³⁸⁴ Rule 4A of the Uniform Rules Court.

³⁸⁵ Rule 19 of the Uniform Rules of Court.

³⁸⁶ Rule 6 of the Uniform Rules of Court.

Both jurisdictions emphasise the importance of discovery to avoid surprises during trial.³⁸⁷ The exception however relates to implied protection of the privacy rights in the Federal Rules of Civil Procedure.³⁸⁸ The courts in the United States tend to follow a strict approach in protecting the right to privacy as opposed to South African courts as seen from the cases discussed in this jurisdiction. This right in South Africa, is limited in terms of the limitation clause test provided in section 36 of the Constitution.³⁸⁹

Both jurisdictions have similar processes on subpoenas and subpoena *duces tecum*.³⁹⁰ The difference is that in the USA, the Federal Rules of Civil Procedure officially enable electronic service and filing of court documents.³⁹¹ This not yet in place in South African rules as far as filing is concerned. The South African rules enable parties to serve by electronic means of communications and have extended this to the filing of court documents.³⁹²

Another major difference as far as the trial proceedings are concerned is that South Africa does not have a jury system. Magistrates and judges preside over South African courts.

The Electronic Communications Privacy Act is similar to RICA, particularly sections 4,³⁹³ 5, and 6 of RICA respectively.³⁹⁴ It is observed that the provisions of the Electronic Communications Privacy Act are not as profound as the South African ECTA. For example, there is no provision that specifically deals with relevant e-technology definitions such as data; data instead is included in the meaning of electronic communication. Whilst the provisions of section 1 of the ECTA provide definitions for data, data controller, data messages and the electronic communication is defined separately.

³⁸⁷ Rule 35 of the Uniform Rules of Court.

³⁸⁸ Rule 26 of the Federal Rules of Civil Procedure.

³⁸⁹ Section 36 of the Constitution of the Republic of South Africa, 1996.

³⁹⁰ Rule 45 of the Federal Rules of Civil Procedure; Uniform Rules of Court; Magistrates' Courts' Rules; Superior Courts' Act of 2013 and rule 38 of the Uniform Rules of Court.

³⁹¹ Rule 45 of the Federal Rules of Civil Procedure.

³⁹² Rule 4A of the Uniform Rules of Court and LSSA guidelines.

³⁹³ Section 4 deals with 'interception of communication by a party to communication'.

³⁹⁴ Sections 5 and 6 are stated in footnote 374 of the previous chapter 2

Furthermore, there is no specific provision for the definition of electronic signature in the USA Electronic Communications Privacy Act while the South African ECTA specifically deals with the definition of electronic signature³⁹⁵ and sets out requirements of what constitutes valid electronic signature.³⁹⁶ The definitions provided in the USA Electronic Communications Privacy Act are more akin to RICA definitions. For example, the Electronic Communications Privacy Act defines the meaning of interception to include aural or acquisition of information obtained through an electronic device.³⁹⁷ This definition is similar to the definition of interception³⁹⁸ in terms of RICA. Moreover, the Electronic Communications Privacy Act defines electronic communication³⁹⁹ in a way that includes electromagnetic system⁴⁰⁰ and this definition is similar to electronic communication system in section 1 of RICA.

There is no particular provision that discuss electronic filing although the Federal Rules of Civil Procedure seem to accommodate electronic filing in civil proceedings.⁴⁰¹ Unlike the USA, South Africa legislated electronic filing in the provisions of section 27 of the ECTA.⁴⁰² There is limitation on the disclosure of electronic communication in section 2511 of the Electronic Communications Privacy Act⁴⁰³ and this is akin to the provisions of section 42 of RICA;⁴⁰⁴ to some provisions of POPI,⁴⁰⁵ and section 50 and 51 of the ECTA.⁴⁰⁶ The rest of the provisions of the Electronic Communications Privacy Act regulate telecommunications and this akin to chapter 7 of the provisions of RICA.⁴⁰⁷

³⁹⁵ Section 1 and 13 of the ECT Act.

³⁹⁶ Section 13 of the ECT Act.

³⁹⁷ Section 2510(4) of the Electronic Communications Privacy Act.

³⁹⁸ Section 1 of the ECT Act.

³⁹⁹ Section 2510(12) of the Electronic Communications Privacy Act.

⁴⁰⁰ Section 2510(12) of the Electronic Communications Privacy Act.

⁴⁰¹ Rule 5.1 of the Federal Rules of Civil Procedure.

⁴⁰² Section 27 of the ECT Act.

⁴⁰³ Section 2511 of the Electronic Communications Privacy Act and Burnside 1987 *Rutgers Computer & Technology Law Journal* 452 -515.

⁴⁰⁴ Sections 2 and 42 – 46 of RICA.

⁴⁰⁵ Sections 2, 19 – 22 and 26 of POPI.

⁴⁰⁶ Sections 50 and 51 of the ECT Act.

⁴⁰⁷ Sections 39 – 41 of RICA, these provisions provide for the duties of the telecommunications service provider.

4. Canada

4.1 History of civil procedure and court structure

According to Watson *et al*, law of civil procedure in Canada was recognised in the 19th century.⁴⁰⁸ Civil claims were commenced by writ of summons.⁴⁰⁹ The clerk of the court, or registrar, issued summons which consisted of a brief overview or outline of the facts of the matter.⁴¹⁰ After that, the plaintiff drafted a statement of claim that set out the cause of action in full.⁴¹¹ Watson *et al* argue that the rules particularly rule 16(1),⁴¹² compelled the plaintiff to serve the claim and the writ on the defendant in person.

Watson *et al* further refer to the case of *Orazio v Cuilla*⁴¹³ where the Supreme Court affirmed that the Plaintiff must serve pleadings in person.⁴¹⁴ The defendant in return drafted a statement of defence wherein he/she set out his/her defence to the claim.⁴¹⁵ The defendant could also draft and serve a counter claim to the plaintiff in response to the claim.⁴¹⁶ These according to Watson were regarded as the pleadings of the proceedings.⁴¹⁷ The parties could discover after exchanging pleadings.⁴¹⁸ The discovery process was conducted by submitting affidavits and these were commissioned under oath.⁴¹⁹ The extent of discovery was only limited to the evidence relevant for the proceedings or litigation.⁴²⁰ According to Watson *et al*, the rules provided that if the plaintiff did not comply with the discovery request, the court could dismiss the claim.⁴²¹

⁴⁰⁸ Watson GD, Borins S and Williams NJ *Canadian Civil Procedure* 2nd ed. (Butterworths Toronto 1977) 1-13 and Polten and Glezl *Civil Procedure in Ontario* 2014 Polten & Associates 9 – 10.

⁴⁰⁹ Watson, Borins and Williams *Canadian Civil Procedure* 1-13.

⁴¹⁰ Watson, Borins and Williams *Canadian Civil Procedure* 3.

⁴¹¹ Watson, Borins and Williams *Canadian Civil Procedure* 2-6.

⁴¹² Watson, Borins and Williams *Canadian Civil Procedure* Chapter 4: 15 and Rule 16.01(1) of the Rules of Civil Procedure of 1990 states: 'An originating process shall be served personally as provided in rule 16.02 or by an alternative to personal service as provided in rule 16.03.2.R.R.O 1990...'

⁴¹³ *Orazio v Cuilla* Supreme Court of British Columbia (Chambers) 1966 57 W.W.R 641.

⁴¹⁴ Watson, Borins and Williams *Canadian Civil Procedure* Chapter 4: 15 -17.

⁴¹⁵ Watson, Borins and Williams *Canadian Civil Procedure* 4.

⁴¹⁶ Watson, Borins and Williams *Canadian Civil Procedure* 4-6.

⁴¹⁷ Watson, Borins and Williams *Canadian Civil Procedure* 4-6.

⁴¹⁸ Watson, Borins and Williams *Canadian Civil Procedure* 6.

⁴¹⁹ Watson, Borins and Williams *Canadian Civil Procedure* chapter 9:3-4.

⁴²⁰ Watson, Borins and Williams *Canadian Civil Procedure* chapter 9: 3 – 4.

⁴²¹ Watson, Borins and Williams *Canadian Civil Procedure* 75.

Tetley, on the history of law of civil procedure in Canada in the 18th century,⁴²² argues that the law of civil procedure was influenced by civil codes.⁴²³ Tetley further argues that civil codes were implemented in Canada, Quebec and included hypothecs.⁴²⁴

During the 19th century, the Court of Kings' Bench was a court of original jurisdiction, conferred with powers by the law of England.⁴²⁵ These are incidental to Superior Courts of Criminal and Civil jurisdiction.⁴²⁶ There was a jury system instead of judges presiding over court matters.⁴²⁷ These courts later became the Supreme Court.⁴²⁸

There was also a court of request, which had jurisdiction to decide on small matters, and monetary claims could not exceed 40 shillings.⁴²⁹ These courts were established in various districts and these later became known as county courts.⁴³⁰ In addition, there were district courts, which had very limited jurisdiction.⁴³¹ The jurisdiction of monetary claims could not be more than 15 dollars.⁴³² There were also appeals courts, which were conferred with powers to decide on appeals from other courts.⁴³³ The highest appeal court was the Privy Council in England.⁴³⁴

Subsequently, the court system went through structural changes between 1795 and 1849, which resulted in the renaming of various court.⁴³⁵ For example, the district courts became county courts.⁴³⁶

⁴²² Tetley W Mixed Jurisdiction: Common Law v Civil Law (Codified and uncoded) *Louisiana Law Review* 694 – 696

⁴²³ Tetley Mixed Jurisdiction: Common Law v Civil Law (Codified and uncoded) *Louisiana Law Review* 694 - 695. These codes are The Civil Code of Lower Canada of 1866; The Code of Civil Procedure of 1867; and the French Civil Code of 1804.

⁴²⁴ Tetley W Mixed Jurisdiction: Common Law v Civil Law (Codified and uncoded) *Louisiana Law Review* 697. The South African courts and the legislature describe hypothec as a right that the owner of the property has against the tenant who owes a rent. The owner of the property may ask a court to attach a movable or immovable property to obtain the rent owed by the tenant. See *Solgas (Pty) Ltd Tang Delta Properties CC* 2016 ZAGP JHC 158; and section 31 of the Magistrates Court Act of 1944.

⁴²⁵ Watson, Borins and Williams *Canadian Civil Procedure* 31.

⁴²⁶ Watson, Borins and Williams *Canadian Civil Procedure* 31.

⁴²⁷ Watson, Borins and Williams *Canadian Civil Procedure* 31.

⁴²⁸ Watson, Borins and Williams *Canadian Civil Procedure* 31.

⁴²⁹ Watson, Borins and Williams *Canadian Civil Procedure* 31.

⁴³⁰ Watson, Borins and Williams *Canadian Civil Procedure* 31.

⁴³¹ Watson, Borins and Williams *Canadian Civil Procedure* 31.

⁴³² Watson, Borins and Williams *Canadian Civil Procedure* 31.

⁴³³ Watson, Borins and Williams *Canadian Civil Procedure* 31

⁴³⁴ Watson, Borins and Williams *Canadian Civil Procedure* 31.

⁴³⁵ Watson, Borins and Williams *Canadian Civil Procedure* 31-39.

⁴³⁶ Watson, Borins and Williams *Canadian Civil Procedure* 31 – 39.

Other courts were also created, namely, Law and Equity Court.⁴³⁷ Chancery courts were established during the restructuring phase.⁴³⁸ The same applies to courts of appeal; which later became as the Ontario Court of Appeal.⁴³⁹

4.2 Current court structure

Walker, Sossin and Polten and Glezl articulate the current court structure. These authors provide a framework of the structure of the different courts.⁴⁴⁰ Walker and Sossin indicate there is a Supreme Court that deals with appeals from lower courts.⁴⁴¹ The Provincial Court of Appeal and Federal Courts follow.⁴⁴² Below the Federal Courts, is the Superior Court of Justice, which is regarded as a court of first instance.⁴⁴³ There are also Ontario Courts on the same level as the Superior Courts.⁴⁴⁴ Family law matters such as adoption, and custody cases, are heard by the Superior Courts and Ontario Courts.⁴⁴⁵ Federal Courts are parallel to the Ontario Courts.⁴⁴⁶ They are referred to as a Trial Division and have jurisdiction to hear and determine civil cases.⁴⁴⁷ These courts can also decide on intellectual property rights.⁴⁴⁸

Running parallel to the Federal Courts⁴⁴⁹ are specialised Tax Courts that preside over matters relating to tax.⁴⁵⁰

⁴³⁷ Watson, Borins and Williams *Canadian Civil Procedure* 31.

⁴³⁷ Watson, Borins and Williams *Canadian Civil Procedure* 31 – 39.

⁴³⁸ Watson, Borins and Williams *Canadian Civil Procedure* 31 -39.

⁴³⁹ Watson, Borins and Williams *Canadian Civil Procedure* 31 -39.

⁴⁴⁰ Polten E and Glezl P 2014 *Civil Procedure in Ontario*
<https://www.poltenassociates.com/Civil-Procedure-English-0011.pdf>
 (Date of use: 25 January 2018)

⁴⁴¹ Walker J and Sossin L *Civil Litigation* 1st ed. (Irwin Law Inc. Toronto 2010) 10 - 12.

⁴⁴² Polten and Glezl *Civil Procedure in Ontario* 2014 7.

⁴⁴³ Polten and Glezl *Civil Procedure in Ontario* 2014 7.

⁴⁴⁴ Walker and Sossin *Civil Litigation* 10; Polten and Glezl *Civil Pcedure in Ontario* 2014 7 and Schafler and Saunders *Litigation and enforcement in Canada: Overview 2016 Thomson Reuters* para 3.

⁴⁴⁵ Polten and Glezl *Civil Procedure in Ontario* 2014 7.

⁴⁴⁶ Walker and Sossin *Civil Litigation* 8 and Polten and Glezl *Civil Procedure in Ontario* 2014 7.

⁴⁴⁷ Polten and Glezl *Civil Procedure in Ontario* 2014 7.

⁴⁴⁸ Polten and Glezl *Civil Procedure in Ontario* 2014 7.

⁴⁴⁹ Schafler and Saunders *Litigation and enforcement in Canada: Overview 2016 Thomson Reuters* para 3.

⁴⁵⁰ Walker and Sossin *Civil Litigation* 13 and Polten and Glezl *Civil Procedure in Ontario* 2014 7.

Below the above-mentioned courts are Divisional Courts,⁴⁵¹ Family Courts,⁴⁵² and Small Claims Courts.⁴⁵³ Divisional Courts determine matters relating to government disputes.⁴⁵⁴

Small Claims Court have limited jurisdiction and cannot hear matters where monetary value exceeds \$ 25 000.⁴⁵⁵ The functioning and operation of these courts is regulated by the rules discussed later in this chapter.

It is important to note that statutes govern the different courts.

4.3 Courts of Justice Act 1990

This Act was passed to regulate the operation⁴⁵⁶ of the different courts and their respective processes.⁴⁵⁷ This Act illustrates the restructuring process of the names of the courts.⁴⁵⁸ For example, when this Act came into operation, the Ontario Court of Justice was changed to Court of Ontario.⁴⁵⁹ Another example relates to the Provincial Courts.⁴⁶⁰ These were changed into the Ontario Court of Justice.⁴⁶¹ Before this, Provincial Courts were regulated by the Provincial Act.⁴⁶²

The Act regulates the manner and process by which the judges are appointed.⁴⁶³ In terms of section 2, the highest court of appeal is the Court of Appeal for Ontario.⁴⁶⁴

⁴⁵¹ Walker and Sossin *Civil Litigation* 10.

⁴⁵² Polten PE and Glezl P *Civil Procedure in Ontario* 2014 7.
www.poltenassociates.com/civil-procedure-English-001pdf. (Date of use: 12 December 2017).

⁴⁵³ Walker and Sossin *Civil Litigation* 11 and Polten and Glezl *Civil Procedure in Ontario* 2014 7.

⁴⁵⁴ Walker and Sossin *Civil Litigation* 10 and Polten and Glezl *Civil Procedure in Ontario* 2014 8.

⁴⁵⁵ Walker and Sossin *Civil Litigation* 11 and Polten and Glezl *Civil Procedure in Ontario* 2014 8.

⁴⁵⁶ Section 71 – 79 of the Courts of Justice Act of 1990 [Herein after referred to as the Courts of Justice Act].

⁴⁵⁷ Sections 34-41 and 42 – 48 of the Courts of Justice Act.

⁴⁵⁸ Section 1 of the Courts of Justice Act.

⁴⁵⁹ Section 1(1) of the Courts of Justice Act.

⁴⁶⁰ Section 1 of the Courts of Justice Act.

⁴⁶¹ Section 1 of the Courts of Justice Act.

⁴⁶² This provision of the Provincial Courts Act were confirmed in the Ex parte Application Re: The Estate of William Woodrow Charles Superior Courts of Justice in Ontario Case no: 01-3632108. According to the court in his case, there were four divisions one of these was relating to the enforcement of the principles of the civil procedure.

⁴⁶³ Section 42 of the Courts of Justice Act.

⁴⁶⁴ Section 2 of the Courts of Justice Act.

This court is conferred powers to determine appeals from lower courts.⁴⁶⁵ According to section 10, the name changes resulted in dividing the Ontario Courts into two divisions.⁴⁶⁶ These are the Superior Court of Justice and Ontario Court of Justice.⁴⁶⁷

Section 11(1) provides that the Superior Court of Justice is still regarded as the Superior Court of record.⁴⁶⁸ This court is conferred with powers originally exercised⁴⁶⁹ in terms of common law.⁴⁷⁰ This is akin to inherent jurisdiction conferred on South African High Courts.⁴⁷¹ These two divisions also have powers to determine matters in accordance with Equity in England and Ontario.⁴⁷²

Section 18 considers branches of the Superior Court of Justice as Divisional Courts⁴⁷³ as was previously the case.⁴⁷⁴ These courts are presided over by judges.⁴⁷⁵ They have jurisdiction to decide on appeals from lower courts.⁴⁷⁶ The quorum of the court is constituted as three judges.⁴⁷⁷ The other court recognised in terms of the Act is the Small Claims Courts.⁴⁷⁸ The Act affirms averments made by Polten and Glezl that Small Claims Court form a branch of the Superior Courts of Justice.⁴⁷⁹ Unlike the South African Small Claims Courts, in Canada it is presided over by judges as opposed to commissioners as it is the case in South Africa.⁴⁸⁰

The Act also fetters the jurisdiction of the Small Claims Court and the statutes determine the amount from time to time.⁴⁸¹

⁴⁶⁵ Section 2 of the Courts of Justice Act.

⁴⁶⁶ Section 10 of the Courts of Justice Act.

⁴⁶⁷ Section 10 of the Courts of Justice Act.

⁴⁶⁸ Section 11(1) of the Courts of Justice Act.

⁴⁶⁹ *Pete et al Civil Procedure* 98.

⁴⁷⁰ Section 11(2) of the Courts of Justice Act.

⁴⁷¹ *Pete et al Civil Procedure* 98.

⁴⁷² Section 11(2) of the Courts of Justice Act.

⁴⁷³ Section 18 of the Courts of Justice Act.

⁴⁷⁴ Section 18 of the Courts of Justice Act.

⁴⁷⁵ Section 18(2) of the Courts of Justice Act.

⁴⁷⁶ Sections 18 to 21 of the Courts of Justice Act.

⁴⁷⁷ Section 21 of the Courts of Justice Act.

⁴⁷⁸ Section 22 of the Courts of Justice Act.

⁴⁷⁹ Section 22 of the Courts of Justice Act.

⁴⁸⁰ Section 22(2) of the Courts of Justice Act.

⁴⁸¹ Section 23(1) (a) of the Courts of Justice Act and Walker and Sossion *Civil Litigation* 11.

Legal representatives represent parties in these courts.⁴⁸² Insofar as the manner in which evidence is presented, the court has power to exclude any part of evidence that may be viewed as irrelevant.⁴⁸³

Section 34 affirms the existence of the Ontario Court of Justice.⁴⁸⁴ Judges preside over these courts according to section 39.⁴⁸⁵ One judge may hear and make a decision on a matter before this court but the same cannot be part of the quorum for the appeal of decision.⁴⁸⁶

Section 65 provides for the establishment of the Civil Rules Committee.⁴⁸⁷ This committee is responsible for making rules for the Court of Appeal⁴⁸⁸ and the Superior Courts of Justice.⁴⁸⁹ The proviso however is that rules must be approved by the Attorney General.⁴⁹⁰ The Act also affirms that the employment of court officers is subject to the Public Service Act of 2000.⁴⁹¹ Section 95 states that the processes applicable in civil procedure are applicable to criminal proceedings.⁴⁹²

Section 136 precludes the use of electronic or e-technology means of recording in the trial proceedings.⁴⁹³ There is however an exception; lawyers are allowed to conduct audio recordings.⁴⁹⁴ The same applies to journalists; they are permitted to audio record⁴⁹⁵ on condition that audio recording must be approved by the judge.⁴⁹⁶ Section 136 permits the use of audio recordings only if it will assist in the process of presentation of evidence.⁴⁹⁷

482 Section 26 of the Courts of Justice Act.
483 Section 27 of the Courts of Justice Act.
484 Section 34 of the Courts of Justice Act.
485 Section 39 of the Courts of Justice Act.
486 Section 39 of the Courts of Justice Act.
487 Section 65 of the Courts of Justice Act.
488 Section 66 of the Courts of Justice Act.
489 Section 66 of the Courts of Justice Act.
490 Section 66 of the Courts of Justice Act.
491 Section 73 of the Courts of Justice Act.
492 Section 95 of the Courts of Justice Act.
493 Section 136(1)(a)(i) of the Courts of Justice Act.
494 Section 136(2)(b) of the Courts of Justice Act.
495 Section 136(2)(b) of the Courts of Justice Act.
496 Section 136(2)(b) of the Courts of Justice Act.
497 Section 136(3) of the Courts of Justice Act.

The use of e-technology in court proceedings will be permitted when parties give consent thereto.⁴⁹⁸ In all circumstances, the judge must approve the use of e-technology even if parties consent.⁴⁹⁹

The court is conferred with powers to declare certain documents confidential.⁵⁰⁰ This is accomplished by court order.⁵⁰¹ Section 141 provides that orders of the court are effected by sheriffs.⁵⁰² The sheriffs are also obliged to execute writs and they do not need to be directed in this regard.⁵⁰³ The respective courts are conferred with powers to hear and determine matters.⁵⁰⁴ This section confirms the jurisdiction of the respective courts. The Federal Courts are regulated by a specific statute called the Federal Courts Act.

4.4 Federal Courts Act 1985

This Act was passed to affirm the continuation of Federal Courts in Canada.⁵⁰⁵ This Act was also passed to regulate processes relevant to the appointment of judges and their deputies.⁵⁰⁶ The Act also confirms the jurisdiction of the Federal Courts.⁵⁰⁷ The Act provides for the establishment of the Rules Committee.⁵⁰⁸ The Act further regulates the manner in which evidence ought to be presented in Federal Court proceedings.⁵⁰⁹

Section 4 states that judges have powers to decide matters.⁵¹⁰ Judges of the Federal Courts of Appeal have the same powers.⁵¹¹

498	Section 136(3) of the Courts of Justice Act.
499	Section 136(3) of the Courts of Justice Act.
500	Section 137(2) of the Courts of Justice Act.
501	Section 137(2) of the Courts of Justice Act.
502	Section 141 of the Courts of Justice Act.
503	Section 143(3) of the Courts of Justice Act.
504	Section 148 of the Courts of Justice Act.
505	Section 3 to 4 of the Federal Courts Act [Hereinafter referred to as the Federal Courts Act].
506	Section 5 to 10 of the Federal Courts Act.
507	Section 36 of the Federal Courts Act.
508	Section 45.1 of the Federal Courts Act.
509	Section 53 to 54 of the Federal Courts Act.
510	Section 4 of the Federal Courts Act.
511	Section 4 of the Federal Courts Act.

The Act states that the governor employs sheriffs.⁵¹² The governor responsible for the employment of sheriffs is in Council.⁵¹³ The processes for the appointment of deputy sheriffs is regulated by the rules.⁵¹⁴ Sheriffs are also regarded as marshals in terms of the Act.⁵¹⁵

In terms of the Act, a judge can preside and decide on a matter.⁵¹⁶ An appeal relating to a matter, which was presided over by one judge, must however be determined by three judges.⁵¹⁷ Section 36 states that Federal Courts have jurisdiction to determine matters where the cause of action arose within or outside Canadian provinces.⁵¹⁸ This includes claims relating to liquidated claims.⁵¹⁹

Section 45 stipulates the creation of the Rules Committee.⁵²⁰ This Committee make rules for the respective courts.⁵²¹ The presiding officer of this committee is the Chief Justice.⁵²² Section 48(1) states that proceedings against the crown commence by filing a claim with the registry.⁵²³ This Act tacitly abolished the jury system that had existed for decades.⁵²⁴

Section 53 provides different methods of presenting, securing, and gathering evidence.⁵²⁵ For example, the Act permits parties to take evidence by means of an affidavit or examination.⁵²⁶ The Act enables parties to collect evidence through commission.⁵²⁷ Section 53(2) states that the court has discretion to decide on the admissibility of evidence.⁵²⁸

⁵¹² Section 13(1) of the Federal Courts Act.

⁵¹³ Section 13 of the Federal Courts Act.

⁵¹⁴ Section 13(3) of the Federal Courts Act.

⁵¹⁵ Section 13(4) of the Federal Courts Act.

⁵¹⁶ Section 15(1) of the Federal Courts Act.

⁵¹⁷ Section 16(1) of the Federal Courts Act.

⁵¹⁸ Section 36 of the Federal Courts Act.

⁵¹⁹ Section 36(2)(b) of the Federal Courts Act.

⁵²⁰ Section 45 of the Federal Courts Act.

⁵²¹ Section 45 of the Federal Courts Act.

⁵²² Section 46(1) of the Federal Courts Act.

⁵²³ Section 48(1) of the Federal Courts Act.

⁵²⁴ Section 49 of the Federal Courts Act.

⁵²⁵ Section 53(1) of the Federal Courts Act.

⁵²⁶ Section 53(1) of the Federal Courts Act.

⁵²⁷ Section 53(1) of the Federal Courts Act.

⁵²⁸ Section 53(1) of the Federal Courts Act.

There are other means of taking or securing evidence before court, for example, a commission may be appointed by the governor.⁵²⁹ This commission is permitted to gather evidence for matters before Federal Courts⁵³⁰ and the Federal Court of Appeal.⁵³¹ The Act also enforces the doctrine of effectiveness throughout Canada.⁵³² This simply means that the decisions of Canadian courts are enforced throughout Canada.⁵³³ The judgments and the decisions of both Federal Courts⁵³⁴ and Federal Courts of Appeal, are effected by sheriffs.⁵³⁵ Item 185(6) of the schedules of the Federal Courts Act affirms the position of the sheriffs before the Act came into operation and this remained unchanged when the Act was promulgated.

4.5 Rules of Civil Procedure

Civil proceedings are regulated by Rules of Civil Procedure.⁵³⁶ These Rules set out different processes that must be followed before, during and after trial.⁵³⁷ For example, the Rules set out a process that parties must follow when they discover documents.⁵³⁸ The important rules pertinent to this are discussed below.

After the writ of summons is issued, the plaintiff must file and serve statement of claim.⁵³⁹ The Rules require personal service for the originating process or documents.⁵⁴⁰ Rule 17 indicates originating process includes counterclaim against any parties to the main action, and cross-claim.⁵⁴¹ Canada is as advanced as England in recognising the use of electronic service.⁵⁴²

⁵²⁹ Section 54(2) of the Federal Courts Act.

⁵³⁰ Section 54(2) of the Federal Courts Act.

⁵³¹ Section 54(2) of the Federal Courts Act.

⁵³² Section 55(1) of the Federal Courts Act and *Pete et al Civil Procedure* 98. According to Eetveldt the doctrine of effectiveness means that the court that decides on the matter must be able to enforce the judgment after the hearing. Eetveldt HW 2016 *De rebus* 36.

⁵³³ Section 55(1) of the Federal Courts Act.

⁵³⁴ Section 55(4) of the Federal Courts Act.

⁵³⁵ Section 55(4) of the Federal Courts Act.

⁵³⁶ Rules of Civil Procedure, consolidated in July 2017 [Hereinafter referred to as Rules of Civil Procedure].

⁵³⁷ Rules of Civil Procedure.

⁵³⁸ Rules of Civil Procedure.

⁵³⁹ Rules 16 to 18 of the Rules of Civil Procedure.

⁵⁴⁰ Rules 16 to 18 of the Rules of Civil Procedure.

⁵⁴¹ Rule 17.01 of the Rules of Civil Procedure.

⁵⁴² Rule 4(2)(h) and Rule 4.04 of the Rules of Civil Procedure.

Rule 1.08 enables parties to use telephone and video conferencing,⁵⁴³ if parties consent⁵⁴⁴ thereto. A condition must be satisfied before parties may record, thus, the court must first grant an order allowing for telephone and video conferencing.⁵⁴⁵ The Rules also provide that the court may, on its own accord, decide to allow e-technology in proceedings without consent from the parties in certain circumstances.⁵⁴⁶ The Rules also recognise electronic issuing of court documents.⁵⁴⁷ There is a proviso however that the software used therefore must be authorized⁵⁴⁸ by the Ministry of the Attorney General.⁵⁴⁹ The Rules also allow parties to file electronically.⁵⁵⁰

Rule 4(9) provides that the parties may use electronic signatures in court proceedings but must follow the requirement.⁵⁵¹ The requirement is that the software used must indicate on the document⁵⁵² that the document is electronically issued or filed.⁵⁵³

Rule 14 recognises electronic filing of the originating process.⁵⁵⁴ Other court pleadings, such as the statement of claim, may be filed electronically.⁵⁵⁵

⁵⁴³ Rule 1.08 of the Rules of Civil Procedure.

⁵⁴⁴ Rule 1.08(2) of the Rules of Civil Procedure.

⁵⁴⁵ Rule 1.08 of the Rules of Civil Procedure.

⁵⁴⁶ Rule 1.08(3) of the Rules of Civil Procedure. Rule 108 (5) states:

'In deciding whether to permit or direct a telephone or video conference, the court shall consider,

- (a) The general principle that evidence and argument should be presented orally in open court;
- (b) The importance of the evidence to the determination of the issues in the case;
- (c) The effect of the telephone or video conference on the court's ability to make findings, including determination about credibility of witnesses;
- (d) The importance in the circumstances of the case of observing the demeanor of a witness;
- (e) Whether a party witness or lawyer for a party is unable to attend because of infirmity, illness or any other reason;
- (f) The balance of convenience between the party wishing the telephone or video conference and the party or parties opposing; and
- (g) Any other relevant matter...'

⁵⁴⁷ Section 4.05 (1.1) of the Rules of Civil Procedure.

⁵⁴⁸ Rule 4.05 of the Rules of Civil Procedure.

⁵⁴⁹ Rule 4.05 of the Rules of Civil Procedure.

⁵⁵⁰ Rule 4.1 of the Rules of Civil Procedure.

⁵⁵¹ Rule 4(9) of the Rules of Procedure.

⁵⁵² Rule 4(9) of the Rules of Procedure.

⁵⁵³ Rule 4(9) of the Rules of Procedure.

⁵⁵⁴ Rule 14.04 of the Rules of Civil Procedure.

⁵⁵⁵ Rule 14 of the Rules of Civil Procedure.

The Superior Court of Ontario in an *ex parte* application in *Re: The Estate of William Woodrow Charles*,⁵⁵⁶ officially recognised the use of electronic communication and held that parties could use e-mails to effect correction notices and that the rules did not preclude the parties from doing so.⁵⁵⁷ Electronic filing is allowed on condition that the party receiving such documents accepts them.⁵⁵⁸

Rule 16 compels parties to personally file originating documents.⁵⁵⁹ This Rule was affirmed by the Superior Court of Justice in *Wood Co Ltd v Lewis Science*.⁵⁶⁰ The court affirmed that the originating process *must* be personally served.⁵⁶¹ If parties are unable to effect personal service, the Rules allow them to serve in the place of residence on a person who is older than 18 years of age.⁵⁶²

Should there be no one at the place of residence;⁵⁶³ parties are permitted to affix the documents to the door of the residence.⁵⁶⁴ This is akin to South African Rule 9(3) of the Magistrates' Courts' Rules.⁵⁶⁵ Rule 16.09 requires the party who served the documents to prove that service was effected by drafting an affidavit.⁵⁶⁶ When service was effected by the sheriff, the latter is required to submit a certificate of service to prove that he/she served the party in question.⁵⁶⁷

⁵⁵⁶ *The Estate of William Woodrow Charles* 2005 Case no: 01-3632/08.

⁵⁵⁷ *The Estate of William Woodrow Charles* 2005 Case no: 01-3632/08 para 10; 11 and 12.

The court further held:

'...More fundamentally, the time has come to recognize the stark reality that our court, for whatever reason, lags unacceptably behind in the use of electronic communications with our court users. Why this is so remains, for me, a mystery. Law firms, our major users, have embraced electronic media to provide information to potential clients and to service their existing clients. The broad array of technologies they use are described in detail by Richard Susskind in his provocative book, *The End of Lawyers? Rethinking the Nature of Legal Services* (2008, Oxford University Press). Some provincial tribunals, such as the Ontario Energy Board, offer parties to proceedings before them comprehensive e-filing services. To which one must ask: why not our court too?'

⁵⁵⁸ Rule 14.04 (2) of the Rules of Civil Procedure.

⁵⁵⁹ Rule 16 of Civil Procedure. The states that originating process 'shall be served personally'. This is mandatory in so far as the originating process is concerned and the rest of the documents need not be served personally.

⁵⁶⁰ *Wood Co Ltd v Lewis Science* 2005 Court file no.05-CV284096PD2.

⁵⁶¹ *Wood Co Ltd v Lewis Science* 2005 Court file no.05-CV284096PD2.

⁵⁶² Rule 16.01(5) of the Rules of Civil Procedure.

⁵⁶³ Rule 16.01(5) of the Rules of Civil Procedure.

⁵⁶⁴ Rule 16.05 of the Rules of Civil Procedure.

⁵⁶⁵ Rule 9(3) of the Magistrates' Courts' Rules and *Pete et al Civil Procedure* 138-138.

⁵⁶⁶ Rule 16.09(1) of the Rules of Civil Procedure.

⁵⁶⁷ Rule 16.09(2) of the Rules of Civil Procedure.

The Rules permit parties to serve a defendant who is outside of Ontario, without obtaining a court order.⁵⁶⁸ This was affirmed in *Mathers v Bruce*⁵⁶⁹ where the court held that proof of service abroad may be done in accordance with the manner provided by the Rules for proof of service in British Columbia.⁵⁷⁰ This rule is similar to edictal citation provided in Rule 5 of the South African Uniform Rules of Court. The difference is that the party must apply to the court to obtain leave to use edictal citation.⁵⁷¹ Rule 17.03 enables the parties to serve by obtaining a court order.⁵⁷²

Insofar as pleadings are concerned, the latter is affirmed in Rule 25 of the Rules of Civil Procedure.⁵⁷³ The Rules officially recognise court pleadings as: statement of claim,⁵⁷⁴ counter claim,⁵⁷⁵ and third party documents.⁵⁷⁶ These pleadings do not need to be served personally.⁵⁷⁷ When all the pleadings are exchanged between the parties, the pleadings will officially close,⁵⁷⁸ meaning that the plaintiff may file for a reply to the defendant's plea.⁵⁷⁹ This is slightly different to South African Rules; when the pleadings are closed, this means parties may discover in preparation for a pre-trial and trial.⁵⁸⁰

There is a further requirement for discovery in the Canadian courts in that a discovery plan must be drafted by the party who wishes to discover.⁵⁸¹ The South African law of civil procedure does not have a process requiring a discovery plan.

⁵⁶⁸ Rule 17.02 of the Rules of Civil Procedure.

⁵⁶⁹ *Mathers v Bruce* 2002 BCSC 210

⁵⁷⁰ *Mathers v Bruce* 2002 BCSC 210 para 13.

⁵⁷¹ Rule 5 of the Uniform Rules of Court and rule 10 of the Magistrates' Courts' Rules.

⁵⁷² Rule 17.02 of the Rules of Civil Procedure.

⁵⁷³ Rule 25 of the Rules of Civil Procedure.

⁵⁷⁴ Rule 25 of the Rules of Civil Procedure.

⁵⁷⁵ Rule 25 of the Rules of Civil Procedure.

⁵⁷⁶ Rule 25 of the Rules of Civil Procedure.

⁵⁷⁷ Rule 25.03(3) of the Rules of Civil Procedure.

⁵⁷⁸ Rule 25 of the Rules of Civil Procedure.

⁵⁷⁹ Rule 25.05 of the Rules of Civil Procedure.

⁵⁸⁰ Rule 29 of the Uniform Rules of Court provides that when pleadings are closed parties must sign an agreement and this must be filed in court to the Registrar. Rule 35 of the Uniform Rules of Court, discusses the process of discovery, inspection and production of documents; In the Magistrate's Court, rule 23 highlights the process of discovery.

⁵⁸¹ Rule 29.1 of the Rules of Civil Procedure.

A notice is instead issued to the party from whom discovery is asked.⁵⁸² Canadian Rules permit discovery through oral examination.⁵⁸³ In the alternative, the witnesses may be examined⁵⁸⁴ and when necessary, may be compelled to appear for examination.⁵⁸⁵ The South African Rules do not have this process of examination during discovery proceedings.

Instead witnesses are compelled to appear in court during the trial proceeding through by subpoena or subpoena *duces tecum*.⁵⁸⁶ The Supreme Court of British Columbia affirmed the importance of discovery in *Fric v Greshman*⁵⁸⁷ regarding disclosure of digital information⁵⁸⁸ and photographs posted on Facebook.⁵⁸⁹ The court considered Rule 7-1(1) and 7-1(14) that regulate discovery of documents⁵⁹⁰ in terms of the Rules of Civil Procedure⁵⁹¹ and confirmed that parties must disclose information necessary for the matter.⁵⁹² The Queens' Bench in *Murphy et al v Bank of Nova Scotia et al*⁵⁹³ held that generally, all documents that relate to a matter in issue must be disclosed.⁵⁹⁴

In *Imperial Oil v Jacques*,⁵⁹⁵ the Supreme Court of Canada confirmed that evidence produced through surveillance needs to be protected.⁵⁹⁶ The court found that it had discretion to enable parties to disclose evidence of privileged communication.⁵⁹⁷

The duties and the functions of the sheriffs are provided in the Rules of Civil Procedure. Rule 44.07 confirms duties, one of which is to serve court documents or pleadings.⁵⁹⁸ Furthermore, sheriffs must enforce order of court.⁵⁹⁹

⁵⁸² Rule 35 of the Uniform Rules of Court; Rule 23 of the Magistrates' Courts' Rules and *Pete et al Civil Procedure* 560.

⁵⁸³ Rule 31.02 of the Rules of Civil Procedure.

⁵⁸⁴ Rule 39.03 of the Rules of Civil Procedure.

⁵⁸⁵ Rule 39.03(5) of the Rules of Civil Procedure.

⁵⁸⁶ Rule 38 of the Uniform Rules of Court.

⁵⁸⁷ *Fric v Greshman* 2012 BCSC 614.

⁵⁸⁸ *Fric v Greshman* 2012 BCSC 614 para 40.

⁵⁸⁹ *Fric v Greshman* 2012 BCSC 614 para 8 and 9.

⁵⁹⁰ *Fric v Greshman* 2012 BCSC 614 para 32.

⁵⁹¹ *Fric v Greshman* 2012 BCSC 614 para 32.

⁵⁹² *Fric v Greshman* 2012 BCSC 614.

⁵⁹³ *Murphy et al v Bank of Nova Scotia et al* 2013 NBQB 316.

⁵⁹⁴ *Murphy et al v Bank of Nova Scotia et al* 2013 NBQB 316 para 42.

⁵⁹⁵ *Imperial Oil v Jacques* 2014 SCC 66.

⁵⁹⁶ *Imperial Oil v Jacques* 2014 SCC 66.

⁵⁹⁷ *Imperial Oil v Jacques* 2014 SCC 66.

⁵⁹⁸ Rule 44.07 of the Rules of Civil Procedure.

⁵⁹⁹ Rule 44.07(3) and (4) of the Rules of Civil Procedure.

Witnesses may be forced to appear and give evidence during trial proceedings.⁶⁰⁰ This is accomplished by serving summons or subpoenas and subpoena *duces tecum* on witnesses.⁶⁰¹ South African courts also issue subpoenas to ensure that witnesses appear in the civil proceedings.⁶⁰² In Canada interprovincial subpoenas are used for witnesses residing outside Ontario.⁶⁰³ South African civil courts do not use this subpoena. Canadian Rules permit the issuing a writ through electronic means.⁶⁰⁴ The same applies to the recognition of issuing writs electronically. South African civil procedure courts are behind in this regard.

4.6 Electronic Commerce Act of 2000

The aim of this Act is to officially recognise and regulate the process of storing, sending and collection of electronic communication or data.⁶⁰⁵

It sets out the manner and conditions upon which parties may use and operate electronic communication or information systems.⁶⁰⁶ It is important to define the meaning of electronic signature in terms of the Act for the purpose of comparative studies.

Section 1(1) defines:

“...‘electronic’ includes created, recorded, transmitted or stored in digital form or in other intangible form by electronic magnetic or optical means or by any other means that has capabilities for creation, recording, transmission or storage similar to those means and electronically has a corresponding meaning; (electronique, par voie electronique)’”⁶⁰⁷

Interpretation of this provision is not like South African electronic communication. This is based on the fact the South African definition of electronic communications does not refer to digital form; it however refers to data texts and includes electronic signature.⁶⁰⁸

⁶⁰⁰ Rule 53.04(1) of the Rules of Civil Procedure.

⁶⁰¹ Rule 53.04 of the Rules of Civil Procedure.

⁶⁰² Rule 38 of the Uniform Rules of Court and section 36 of the Superior Courts Act.

⁶⁰³ Rule 53.05 of the Rules of Civil Procedure.

⁶⁰⁴ Rule 60.07(1.1) of the Civil Procedure.

⁶⁰⁵ Section 1 of the Electronic Commerce Act chapter 17 of 2000 [Hereinafter referred to as the Electronic Commerce Act].

⁶⁰⁶ Sections 4 to 13 of the Electronic Commerce Act.

⁶⁰⁷ Section 1 of the Electronic Commerce Act.

⁶⁰⁸ Section 1 of the Canadian Electronic Communications Act of 2000, this act defines electronic

It is significant to define electronic signature in the context of Canadian law and civil Rules. Section 1(1) states

“...electronic signature’ means electronic information that a person creates or adopts in order to sign a document and that is in, attached to or associated with the document; (“signature électronique”)⁶⁰⁹

The ECTA does not specifically define electronic signature *per se*. Instead, it is included in the meaning of electronic communication. The ECTA however defines advanced electronic signature.⁶¹⁰ The meaning of advanced electronic communications in the ECTA refers to what constitutes a valid advanced electronic signature as opposed to a broad meaning of electronic signature provided in the Electronic Commerce Act.⁶¹¹ Section 13 of the ECTA is also important in this regard, as it sets out the requirements of a valid advanced electronic signature.⁶¹²

Section 3 of the Electronic Commerce Act permits parties to use electronic communication in legal documents.⁶¹³ This is subject to the requirement that parties must consent to such electronic communication.⁶¹⁴ Section 3 also makes provision for implied consent deduced from conduct of parties.⁶¹⁵ This is similar to section 5(1) of RICA in South African e-technology law.⁶¹⁶ Section 5(2) of RICA allows the deduction of tacit consent in a given scenario.⁶¹⁷ Section 5 of the Electronic Commerce Act recognises documents in electronic form.⁶¹⁸

communications as ‘electronic communication means data messages, electronic signature...logically associated with other data and intended to by the user to serve as a signature, e-mail means electronic mail; data message used as a mail message between the originator and addressee in an electronic communication’.

⁶⁰⁹ Section 1 of the Electronic Commerce Act.

⁶¹⁰ Section 1 of the ECTA states that ‘advanced electronic communications’ means an Electronic signature which results from a process which has been accredited by the authority as provided for in section 37; authentication products or service means products or service designed to identify the holder of an electronic signature to other person’.

⁶¹¹ Section 1 and 13 of the ECTA deals with signature and this is discussed in the previous chapter, in chapter 2.

⁶¹² Section 13 of the ECTA.

⁶¹³ Section 3 of the Electronic Commerce Act.

⁶¹⁴ Section 3(2) of the Electronic Commerce Act.

⁶¹⁵ Section 3(2) of the Electronic Commerce Act.

⁶¹⁶ Section 5(1) of RICA states that parties must consent to the interception of electronic Communications

and a tacit consent is also accepted in this regard.

⁶¹⁷ Section 5(2) of RICA allows interception of electronic communications.

⁶¹⁸ Section 5 of the Electronic Commerce Act. Section 5 states: ‘... A legal requirement that information or a document be in writing is satisfied by information or a document that is in electronic form if it is accessible so as to be usable for subsequent reference...’

According to section 5, this satisfies the legal requirement that documents must be in writing⁶¹⁹ and this is similar to section 12 of the South African ECTA.⁶²⁰ This provision is akin to section 12 of the ECTA, which requires that the document ought to be in writing to constitute data text.⁶²¹

Section 25 provides that computer generated documents or information, produced before this Act came into operation, shall be recognised retrospectively.⁶²²

4.7 Personal Information Protection and Electronic Documents Act 2000

This Act was passed to regulate the protection of electronic communication.⁶²³ The Act aims at providing means of protecting information.⁶²⁴ The Act further regulates the manner in which evidence is collected, using technology, and promotes privacy of personal information,⁶²⁵ used or distributed through means of e-technology or electronic communications.⁶²⁶ The nub of this Act is to enforce privacy.⁶²⁷

Section 4 refers to the extent of the application of the Act. This section provides that the Act applies to all organisations dealing with e-technology produced information.⁶²⁸ Section 4 precludes the disclosure of personal information⁶²⁹ particularly, where there is a certificate issued that specifically prohibits the disclosure of such information.⁶³⁰

⁶¹⁹ Section 5 of the Electronic Commerce Act.

⁶²⁰ Section 12 of the South African ECTA sets out a requirement that a legal document must be in writing and this discussed in the previous chapter, chapter 2.

⁶²¹ Section 12 of the ECTA.

⁶²² Section 25.1 of the Electronic Commerce Act.

⁶²³ The Preamble of the Personal Information Protection and Electronic Documents Act of 2000 [Hereinafter referred to as PIPEDA].

⁶²⁴ The preamble and section 3 of PIPEDA. The preamble states:
‘...An Act to support and promote electronic commerce by protecting personal information that is collected, used or disclosed in certain circumstances, by providing for the use of electronic means to communicate or record information or transactions and by amending the Canadian Evidence Act, the Statutory Instruments Act and the Statute Revision Act...’

⁶²⁵ Section 3 of PIPEDA. Section 3 states:
‘...The purpose of this Part is to establish in an era in which technology increasingly facilitates the circulation and exchange of information, rules to govern the collection, use and disclosure of personal information in a manner that recognizes the right of privacy of individuals with respect to their personal information and the need of organizations to collect, use or disclose personal information for purposes that a reasonable person would consider appropriate in the circumstances...’

⁶²⁶ The preamble and section 3 of PIPEDA.

⁶²⁷ The preamble of PIPEDA.

⁶²⁸ Section 4 of PIPEDA.

⁶²⁹ Section 4.1(1) of PIPEDA.

⁶³⁰ Section 4.1(1) of PIPEDA.

There are however, exceptions to the prohibition, namely disclosure may occur on consent to such disclosure.⁶³¹

Section 7(2) sets out conditions that must be met before disclosure without consent can take place.⁶³² For example, disclosure is permitted, if disclosure occurs during the course of business.⁶³³ Furthermore, personal information may be disclosed when there is a life-threatening event.⁶³⁴ Personal information may also be disclosed for insurance purposes.⁶³⁵ Personal information may be disclosed for research purposes.⁶³⁶ Personal information may also be disclosed for the purpose of gathering statistics.⁶³⁷

The Act also provides for subpoena *duces tecum* and this is regarded as one of the conditions upon which disclosure may be permitted.⁶³⁸ Personal information may also be disclosed when related to national security.⁶³⁹ Furthermore, disclosure of personal information is allowed without the concerned person's consent during an investigation process.⁶⁴⁰

There is a process to be followed before disclosure can take place, namely the party seeking information must submit a written request for disclosure.⁶⁴¹ The retention of the personal information is dependent on the duration of the period for which information is needed.⁶⁴² In other words, the Act does not prescribe the period of retention of personal information which differs from section 51(7) of the South African ECTA.⁶⁴³

⁶³¹ Section 6.1 of PIPEDA.

⁶³² Section 6.1 of PIPEDA.

⁶³³ Section 7(2)(a) of PIPEDA.

⁶³⁴ Section 7(2)(b) of PIPEDA.

⁶³⁵ Section 7(2) (b.1) of PIPEDA.

⁶³⁶ Section 7(2) (c) of PIPEDA.

⁶³⁷ Section 7(2) (c) of PIPEDA.

⁶³⁸ Section 7(3) (c) of PIPEDA.

⁶³⁹ Section 7(3) (c) of PIPEDA.

⁶⁴⁰ Section 7(3) (c) (iii) of PIPEDA.

⁶⁴¹ Section 8(1) of PIPEDA.

⁶⁴² Section 8 of PIPEDA.

⁶⁴³ Section 51(7) of the ECTA.

Section 20(1) enforces the implementation of the principle of confidentiality.⁶⁴⁴ This section precludes those, who have access to, and knowledge of personal information, from a commissioner, from disclosing such information.⁶⁴⁵ Section 43 recognises the use of electronic signature.⁶⁴⁶

4.8 Comparative analysis

As a starting point the researcher will make a distinction between South African and Canadian statutes as far as the law civil of civil procedure is concerned. Comparison of rules already conducted in the discussion above, and therefore will not be referred to further below.

The South African Superior Courts Act,⁶⁴⁷ and Canadian Courts of Justice⁶⁴⁸ and Federal Courts Act⁶⁴⁹ have similar provisions. For example, they all affirm the jurisdiction of the respective courts, which was initially conferred on the courts in terms of common law.⁶⁵⁰ South African High Courts and Canadian Superior Courts of Justice have inherent jurisdiction.⁶⁵¹ The three statutes also provide for processes relating to appointment of judges.⁶⁵² These three statutes also confirm the quorum in superior courts.⁶⁵³

Differences however lie in the operation of the Small Courts in Canada.⁶⁵⁴ The South African Small Claims Court is operated and presided over by commissioners⁶⁵⁵ and there is no legal representation.⁶⁵⁶ The parties themselves present evidence and the process is more inquisitorial.⁶⁵⁷

⁶⁴⁴ Section 20(1) of the Electronic Commerce Act.

⁶⁴⁵ Section 20(1) of PIPEDA Act.

⁶⁴⁶ Section 43 of PIPEDA.

⁶⁴⁷ Superior Courts Act of 2010.

⁶⁴⁸ The Courts of Justice Act.

⁶⁴⁹ Federal Courts Act.

⁶⁵⁰ Section 36 of the Federal Courts Act; section 22 of the Courts of Justice Act.

⁶⁵¹ *Pete et al Civil Procedure* 98, they confirm the High Court's inherent jurisdiction; section 36 of the Federal Courts Act.

⁶⁵² Courts of Justice Act; sections 5 -10 of the Federal Courts Act and the Superior Courts Act of 2010.

⁶⁵³ Section 22 of Courts of Justice Act; section 15 of the Federal Courts Act and the provisions of Superior Courts Act.

⁶⁵⁴ The Court of Justice Act.

⁶⁵⁵ Small Claims Court Act.

⁶⁵⁶ Small Claims Court Act.

⁶⁵⁷ Small Claims Courts Act.

In Canada, Small Claims Courts are presided over by judges and legal representatives represent parties.⁶⁵⁸ The rules of evidence do not apply in the South African Small Claims Court whilst in Canadian law this is important because there are judges who preside and legal representatives who argue on behalf of parties.⁶⁵⁹ It is noted that the statutes mentioned above all highlight the functions of sheriffs.⁶⁶⁰

As far as electronic communication is concerned, there are slight similarities between RICA, POPI, ECTA; PIPEDA and the Canadian Electronic Commerce Act. For example, a definition is provided in the Electronic Commerce Act, defining electronic communication.⁶⁶¹ The South African ECTA affirms that electronic communication forms data text.⁶⁶² There is no definition of data text in the Canadian Electronic Commerce Act.⁶⁶³

Section 5 of the Canadian Electronic Commerce Act is similar to section 12 of the South African ECTA⁶⁶⁴ because they both require that a legal document must be in writing.⁶⁶⁵ Both the ECTA and Electronic Commerce Act recognise the use of electronic signature.⁶⁶⁶ There is nothing mentioned in the Electronic Commerce Act regarding filing and electronic issuing of court documents.⁶⁶⁷ In section 27 of the ECTA there are explicit provisions that recognise electronic e-filing.⁶⁶⁸ The Canadian Rules of Civil Procedure recognise electronic filing and service of court documents.⁶⁶⁹

⁶⁵⁸ Section 22 of the Courts of Justice Act.

⁶⁵⁹ Section 22 to 24 of the Courts of Justice Act.

⁶⁶⁰ Section 143(3) of the Courts of Justice Act; item 185(6) of the Federal Courts Act and the provisions of Superior Courts Act of 2010.

⁶⁶¹ Section 1(1) of the Electronic Commerce Act.

⁶⁶² Section 1 of the ECTA provides for a definition of data and part of the provisions of the ECT Act sets out the requirements of what constitutes data in a legal context.

⁶⁶³ Electronic Commerce Act.

⁶⁶⁴ Section 12 of the South African ECTA.

⁶⁶⁵ Section 12 of the ECTA; part 2 section 41 of PIPEDA and section 5 of the Electronic Commerce Act.

⁶⁶⁶ Section 13 of the ECTA and section 1 of the Electronic Commerce Act.

⁶⁶⁷ Electronic Commerce Act and Section 27 of the ECTA.

⁶⁶⁸ Section 27 of the ECTA.

⁶⁶⁹ Rules 4.04 and 4.05 of the Rules of Civil Procedure.

The South African rules of civil procedure do not officially permit electronic e-filing, although recent amendments to the rules appear to accept electronic service of court documents.⁶⁷⁰ The electronic signature is also recognised in Canada⁶⁷¹ as is the case in section 13 of the South African ECTA.⁶⁷²

When comparing South Africa, England, the USA and Canada it is evident that England is far advanced in embracing the use of e-technology⁶⁷³ in civil process. It appears that the other two jurisdictions are following in England's footsteps in implementing e-technology law.

As mentioned above, there are, to some extents, similarities between PIPEDA, RICA and POPI. These provisions concisely aim at protecting disclosure and interception of personal information. In other words, they seek to enforce the protection of the right to privacy. Section 5;⁶⁷⁴ 6;⁶⁷⁵ 7;⁶⁷⁶ 8;⁶⁷⁷ 9⁶⁷⁸ and 42⁶⁷⁹ of RICA limit and regulate the interception of electronic communications.⁶⁸⁰ For example, section 5 permits interception when there is consent for the later whether direct or indirect.⁶⁸¹

Section 8 of RICA and section 7(2)(b) of PIPEDA, permit disclosure or interception of personal information in cases of emergencies.⁶⁸² The same applies to section 6 of RICA; disclosure may take place when conducted during the course of business.⁶⁸³ This provision is similar to the exceptions in section 7(2) of PIPEDA and POPI provisions.⁶⁸⁴

⁶⁷⁰ LSSA guidelines of 2015, the law society drafted rules that will enable practitioner use appropriate service providers when storing, collecting and distributing client's electronic communications.

⁶⁷¹ Section 1 of the Electronic Commerce Act.

⁶⁷² Section 13 of the ECTA and Van der Merwe *et al Information and Communications Technology Law* 141 and 142.

⁶⁷³ Practice Direction 510 – the electronic working pilot scheme.

⁶⁷⁴ Section 5 deals with consent to interception of electronic communication.

⁶⁷⁵ Section 6 provides for interception of electronic communication when conducted in connection with carrying on business.

⁶⁷⁶ Section 7 permits interception when there is possible 'serious bodily harm'.

⁶⁷⁷ Section 8 permits interception in cases of emergencies.

⁶⁷⁸ Section 9 allows interception of electronic communications when required by law.

⁶⁷⁹ Section 42 provides for general prohibition.

⁶⁸⁰ Sections 4; 5 and 6 of RICA.

⁶⁸¹ Section 5 of RICA.

⁶⁸² Section 8 of RICA.

⁶⁸³ Section 6 of RICA.

⁶⁸⁴ Section 7(2) of PIPEDA.

Section 11 of POPI is similar to section 6.1 of PIPEDA in that both require consent before the disclosure of personal information may take place.⁶⁸⁵ Furthermore, section 26 of POPI precludes parties from disclosing information.⁶⁸⁶ There are however exceptions in section 27 similar to section 7 of PIPEDA. Section 14 of POPI is to a certain extent similar to section 51(7) of the ECTA and section 8 of PIPEDA. All of these provisions relate to the retention of electronic communication stored, collected and distributed. They affirm that the documents or information can be retained to the extent necessary. The exception provided in section 51(7) of the ECTA requires that information be retained for a year after its use.⁶⁸⁷ It appears that both POPI and PIPEDA enforce the implementation of confidentiality in its provisions.⁶⁸⁸

Preliminary conclusion

There is no doubt that the three jurisdictions discussed in this chapter have similar processes and in the same breath, differences. They all seek to ensure that civil procedure is well regulated and abreast with the recent developments in law. It is clear that English statutes are to a certain extent the most similar to those of South Africa. The South African ECTA is however more detailed than that of England, the United States of America, and Canada.

In chapter 5 the researcher presents her conclusions and draft proposed amendments to South African law and regulation which incorporate e-technology law and advances.

⁶⁸⁵ Section 11 of POPI and section 6.1 of PIPEDA.

⁶⁸⁶ Section 26 of POPI states: 'A responsible party may subject to section 27 not process personal information concerning –

(a) The religious or philosophical beliefs, race or ethnic origin, trade union membership, political persuasion, health or sex life or biometric information of data subject ...'

Section 27(1) states: 'The prohibition on processing information as referred to – in section 26, does not apply if the –

(a) Processing is carried out with the consent of a data subject referred to in section 26;

(b) Processing is necessary for the establishment, exercise or defence of a right or obligation in law;

(c) Processing is necessary to comply with an obligation of international public law;

(d) Processing is for historical, statistical or research purposes to the extent that: -

(i) The purpose serves a public interest and the processing is necessary for the purpose concerned; or

(ii) It appears to be impossible or would involve a disproportionate effect to ask for consent, and sufficient guarantees are provided for to ensure that the processing does not adversely affect the individual privacy of the data subject to a disproportionate extent;

⁶⁸⁷ Section 54 of POPI and section 20 of PIPEDA.

⁶⁸⁸ The preamble of POPI.

In this process she relies on certain prescriptions garnered from the comparative study conducted in this chapter.

CHAPTER FIVE - CONCLUSIONS AND RECOMMENDATIONS

Chapter preface

This chapter provides conclusions and recommendations to the researcher's overarching thesis. It aims further to cure the identified gaps in legislation and enabling rules regulating the South African law of civil procedure. The suggested amendments are in-line with the ECTA and other e-technology law and regulation.

1. Research conclusions

In chapter 1 the researcher indicated that the researcher will examine current statutory provisions and rules regulating South African civil procedure to determine the extent of their conformity with the ECTA and related e-technology law. She achieved her aim via the research presented in chapters 2 – 4.

In chapter 2 the Superior Courts Act,¹ Seventeenth Amendment Act of 2012,² Magistrates' Courts Act,³ Small Claims Court Act,⁴ Sheriffs Act,⁵ National Credit Act,⁶ Consumer Protection Act,⁷ Divorce Act,⁸ RICA⁹ and POPI Act¹⁰ were interpreted for lacunae regarding the implementation of the ECTA. The researcher proved a lack of conformity between certain statutory provisions and the implementation of the ECTA. These relate inter alia to issues of service, subpoena process, discovery, and the use of electronic signature and advanced electronic signature. The recommendations provided below cure these defects via proposed draft amendments to certain aspects of the aforementioned legislation to ensure compliance with the ECTA and related e-technology law.

¹ Superior Courts Act 10 of 2013.

² Seventeenth Amendment Act of 2012.

³ Magistrates' Courts Act 32 of 1944.

⁴ Small Claims Court Act 61 of 1984.

⁵ Sheriffs Act 90 of 1986.

⁶ National Credit Act 34 of 2005.

⁷ Consumer Protection Act 66 of 2008.

⁸ Divorce Act 70 of 1979.

⁹ Regulation of Interception of Communications and Provision of Communication-related Information Act 70 of 2002

¹⁰ Protection of Personal Information Act 4 of 2013.

In chapter 3, the researcher considered current South African court rules where ECTA provisions or e-technology law ought to be implemented. She observed that the process of discovery and subpoena do not embrace the use of e-technology. She proposed that e-technology devices, such as video tele-conference and digital e-technology could be used to cure these defects and others identified in relation thereto. Proposed draft amendments to the rules are provided here to ensure conformity between civil procedure legislation, enabling rules and the ECTA.

In chapter 4, the researcher conducted a comparative investigation between England, the United States of America, Canada, and South Africa. The comparative approach illustrated that international jurisdictions are ahead of South Africa in embracing e-technology in civil proceedings. Although the United States of America and Canada have begun implementing e-technology law, England has set a benchmark through her a pilot project aimed at digitising civil proceedings. Lessons from these jurisdictions are incorporated into the researcher's recommendations below to hasten the implementation of e-technology in South African civil proceedings.

Overall the researcher has proven that the ECTA provides strategies to government institutions to embrace e-technology. South African Courts fall within the ambit of government institutions; therefore, courts are bound by the ECTA. The Act provides methods and mechanisms to assist South African courts to cut-down unnecessary cost expenditure caused by, for example, printing copies filed to court and respective parties. The ECTA, if effectively implemented in civil proceedings, will save time, and reduce costs to clients.

The research highlights significant aspects of the law of civil procedure affected by e-technology. For example, some legislation still requires personal service despite the ECTA, which provides more efficacious and cost-effective mechanisms to do so.¹¹ In addition, the use of electronic signature would greatly reduce the number of court hours spent signing and then physically attending to filing or taxation, for example.¹²

¹¹ Section 74(Q) of the Magistrates Court Act; Section 168(q) of the National Credit Act and section 11 of the Small Claims Court Act.

¹² Rule 4 of the Constitutional Court Rules; Rule 17(3) of the Uniform Rules of Court and rule 4(1) (a) of the Magistrates' Court Rules; and rule 3(5) of the Rules Regulating matters in respect of Small Claims Court; Papadopoulos and Snail *The law of the internet in South Africa* 320.

Accordingly, the thesis demonstrated a need to cure the lack of legislative conformity, in the law of civil procedure, and the necessity of keeping abreast with e-technology law; its significance and practicality.¹³

It was observed that certain definitions pertinent to civil proceedings are not in-line with current e-technology and the ECTA. For example, the delivery definition in some rules does not refer to electronic communications.¹⁴ Signature, referred to in the rules, does not refer to the use of advanced electronic signature.¹⁵ This call for an amendment to certain definitions in-line with the said law.¹⁶ A proposed draft of the identified definitions is provided later in this chapter.

It was further observed that the processes relating to the manner in which evidence is brought before the court do not necessarily cater for tele-conferences, digital video records, and other means of e-technology communication.¹⁷

In this chapter, proposed statutory amendments are provided in the form of draft amendments that can be affected to cure the shortcomings.¹⁸ The chapter will provide a draft proposal on the discovery processes to ensure it accommodates electronic discovery, as it the case in international jurisprudence.¹⁹

England's Practice Direction 510 – Electronic Working Pilot Scheme that is discussed in chapter 4 demonstrates that it is feasible to use electronic means of effecting service, filing of court's documents and archiving the electronically saved files. If England can effectively run the pilot project, South African Courts can also embrace the use of e-technology in civil proceedings, it is borne in mind that rule 4A of the Uniform Rules of Court does to a certain extent embrace e-technology in civil procedure, but this rule will be modified to ensure that it fully complies with e-technology legislation.

¹⁴ Rule 1 of the Rules Regulating matters in respect of Small Claims Court.

¹⁵ Rule 3(5) of the Rules Regulating Matters in respect of Small Claims Court.

¹⁶ Another example relates to definitions that are referring to filing and delivery, it is observed these do not currently embrace e-technology.

¹⁷ Rules 35; 38 of the Uniform Rules of Court; Sections 51 -53 of the Magistrates' Court Act. It is however observed that the courts' approach in deciding on the evidence relating to e-technology is flexible and recognize the use in the court's proceeding as seen *in S v Ndiki; Motata v Nair; PFE International Inc. and others v Industrial Development Corporation of South Africa Limited* 2012 ZACC; *Meyer v Marcus* 2004 ZAWCHC 15; *Maize Board v Hart* 2006 SCA; and other cases that are discussed in the previous chapters; as well as the views shared by the scholars such as Nel 2007 XL CILSA 193 – 214; Snykers 1997 *Heinonline* 693 – 694; Van der Merwe 1971 *De Rebus* 221 -223; Papadopoulos and Snail *The law of the internet in South Africa* 328 – 329; Van der Merwe *et al Information and Communications Technology Law* 178; Cassim 2017 *Journal for Juridical Science* 24-25 and so forth.

¹⁸ For example, sections 35; 36; and 43 of the Superior Courts Act; sections 17; 31; 51; 52; 54;57 and 74Q (4) A of the Magistrates' Courts' Act and so forth.

¹⁹ Rule 35 of the Uniform Rules of Court.

The researcher provides recommendations aimed at the pre-trial proceedings, trial and post-trial stages of South African civil proceedings.

2. Recommendations

2.1 Pre-trial proceedings

It is submitted that each court should have an administrative centre centralised and managed by the registrar in the superior courts and clerk in the lower courts.²⁰ The registrar and the clerk are already familiar with civil proceedings and are thus best placed to ensure effective operation of the proposed centre. Centralisation serves the additional purpose of accountability. The researcher suggests that the centre be termed *Centre for Digital and E-technology*. The Centre will be constituted in-line with section 27 of the ECTA. It should be composed of different divisions one of which deals with electronic or digital application proceedings to ensure electronic management of the process.²¹ A division for summons proceedings will deal with processes relating to summons proceedings and make provision for of e-technology throughout the process.²²

²⁰ England has a website and the pilot project that is successfully running in terms of the Practice Direction 510. Some of the Courts have websites that are already in place such as the Constitutional Court and the Supreme Court of Appeal. The department will just modify the effective operation of e-technology. According to Reid 'the very best document-formatting system is a good secretary'.

A High-Level Approach to Computer Document Formatting

[http://delivery.acm.org/10.1145/570000/567449/p24-](http://delivery.acm.org/10.1145/570000/567449/p24-reid.pdf?ip=163.200.101.58&id=567449&acc=ACTIVE%20SERVICE&key=646D7B17E601A2A5%2E24AFF711EFAADD7C%2E4D4702B0C3E38B35%2E4D4702B0C3E38B35&acm=1519032794_353537c257de89c4945ffb732c948b9d)

[reid.pdf?ip=163.200.101.58&id=567449&acc=ACTIVE%20SERVICE&key=646D7B17E601A2A5%2E24AFF711EFAADD7C%2E4D4702B0C3E38B35%2E4D4702B0C3E38B35&acm=1519032794_353537c257de89c4945ffb732c948b9d](http://delivery.acm.org/10.1145/570000/567449/p24-reid.pdf?ip=163.200.101.58&id=567449&acc=ACTIVE%20SERVICE&key=646D7B17E601A2A5%2E24AFF711EFAADD7C%2E4D4702B0C3E38B35%2E4D4702B0C3E38B35&acm=1519032794_353537c257de89c4945ffb732c948b9d). (Date of use: 19 February 2018)

²¹ According to Cohen P, people must use an effective backup to ensure security storage of data and he argues that blackblaze and cloud backup are useful; people '...don't need an internet connection or even a working network- just the computer, the hard-drive, and the cable to connect them is enough to get your file back'.

Cohen P; Should I use an external drive for backup" 2016.

<https://www.backblaze.com/blog/external-drive-backup/> (Date of use: 19 February 2018).

²² Iris Document to Knowledge – A canon Company in America confirms that it is possible to purchase OCR Software that will facilitate the use of bulky documents. According to this company 'CDR' stands for optical character recognition and it is 'software package that converts an image, a PDF file, or scanned document into fully editable text file'. It is suggested that this software can also be used to number the files of the courts by the registrar and the clerks of the courts as required by the respective rules.

<http://www.irislink.com/EN-US/c1462/Readiris-16-for-Windows---OCR-Software.aspx>

(Date of Use: 19 February 2018). According to Papadopoulos and Snail there are two types of software that can be used, thus 'system software and application software' and this can be divided into different categories.

All signature requirements must cater for the use of advanced electronic signature. in compliance with sections 1 and 13 of the ECTA. An ICT division should provide necessary support to all needs and challenges. More importantly, the division must monitor storage, collection, use and distribution, of data relating to court proceedings.²³

Alternatively, one system should be created catering for all functions suggested in this chapter. For example, filing information disclosed during the discovery process. This will demonstrate compliance with section 50 and 51 of the ECTA. This division could monitor electronic communication in order to comply with RICA. There could be a division linked to the ICT department to ensure data conformity with the POPI Act to promote and affirm privacy.

The new tracking system should be designed to facilitate court proceedings; such a system will enable the plaintiff and defendant's legal representatives access to to monitor progress on their matters. To ensure and promote confidentiality, it is recommended that a password should be generated and encrypted.²⁴ Only parties to the proceedings should use the password.²⁵ This intervention should also be a quality assurance mechanism.²⁶

The system should also be designed to send e-mails pop-ups reminders to parties to remind them of due dates relating to pleadings.²⁷

(Papadopoulos and Snail *The law of the internet in South Africa* 124). It may be prudent to consider choosing the best software for the new department.

²³ Section 1 of the ECTA, these fall within the meaning of data as provided in section of the ECTA.

²⁴ The Biometric Authentication Conundrum by Occupyweb 2015.
<https://null-byte.wonderhowto.com/news/flawed-laptop-fingerprint-readers-make-your-windows-password-vulnerable-hackers-0139037/> (Date of use: 19 February 2018)

²⁵ The Biometric Authentication Conundrum by Occupyweb 2015.
<https://null-byte.wonderhowto.com/news/flawed-laptop-fingerprint-readers-make-your-windows-password-vulnerable-hackers-0139037/> (Date of use: 19 February 2018)

²⁶ Drevin L, Kruger HA and Steyn T Value-focused assessment of ict security awareness in an academic environment *Computer & Security* 2007 36 – 43. These scholars argue that password encryption is important in protecting confidentiality of the documents.
They profess that many 'people write their passwords on pieces of paper 'and this compromises confidentiality'. The officials and those who will have access to the new system should avoid this. There ought to be another format of encryption such as fingerprints provided that this is properly encrypted and secured. Another alternative is the use of Biometric authentication conundrum. According to Occupyweb this is the best method of protecting confidentiality.
The Biometric Authentication Conundrum by Occupyweb 2015.
<https://null-byte.wonderhowto.com/news/flawed-laptop-fingerprint-readers-make-your-windows-password-vulnerable-hackers-0139037/> (Date of use: 19 February 2018)

²⁷ According to Vasant Nayak a system designed with specific instructions that includes

For example, after serving summons on the defendant, an automatic e-mail should be sent to the defendant reminding him/her that the notice of intention to defend must be filed in 10 days.²⁸ In addition, an alert should also be used to inform the defendant of the fact that summons has been instituted electronically. This is another quality assurance measure relating to e-technology process.

The system should also be designed to enable the sheriff to conduct inventory process digitally via e-technology.²⁹ For example, the sheriff could use equipment automatically connected to the system that captures the assets, automatically determines the value thereof, and then saves these details on the system whilst the sheriff is still on the premises of the defendant.³⁰ Put differently, a device that will enable sheriffs to scan the asset number must be designed. This device should be linked directly to the system so that when sheriffs scan the asset number on the premises of the defendant, it will automatically capture on the system and at the same time estimate the value of each asset.³¹ When the value of the judgment is determined on the system, the device should inform the sheriff that the value of the judgment has been satisfied.

A reminder sent through e-mails is feasible. Nayak invented 'an e-mail and task-managing software for Microsoft Outlook users'.

United States Patent Application Publication

<https://aplegal.com/wp-content/uploads/patents/Nayak,%20Vasant%20-%20Email%20and%20Taskmanaging%20Software.pdf?iframe=true&width=800&height=400>

(Date of use: 19 February 2018)

²⁸ United States Patent Application Publication

<https://aplegal.com/wp-content/uploads/patents/Nayak,%20Vasant%20-%20Email%20and%20Taskmanaging%20Software.pdf?iframe=true&width=800&height=400>

(Date of use: 19 February 2018)

²⁹ A new system can be designed that facilitates the use of a scanner that will scan the asset number and automatically determine the value of that asset, just as it is the case in the retail industry. The latter use scanners to determine the price of the items by using bar code.

<http://retailjhb.co.za/pos/bar-code-scanners/bluetooth-barcode-scanner>

(Date of use: 19 February 2018)

³⁰ A new system can be designed that facilitates the use of a scanner that will scan the asset number and automatically determine the value of that asset, just as it the case in retail. The latter use scanners to determine the price by using bar codes.

<http://retailjhb.co.za/pos/bar-code-scanners/bluetooth-barcode-scanner> (Date of use: 19 February 2018)

³¹ <http://retailjhb.co.za/pos/bar-code-scanners/bluetooth-barcode-scanner> (Date of use: 19 February 2018)

The researcher is of the view that the use of e-technology in civil proceedings in future, will do away with paper work that the sheriff currently must complete when conducting inventories.

The system should also be designed in a manner that ensures that the software used is in-line with the international standards³² and is protected at all times.³³ Software must have capacity to save large volumes of documents. There should also be a division that deals with electronic archives for all court documents, including e-filing of court papers.³⁴ The archive department should also be responsible for creating electronic files for civil proceeding court matters.³⁵ Files should be created in a manner that will enable the court to access and read them during the proceedings.³⁶ These files must also be named in an orderly manner starting with the documents that commence proceedings.³⁷ For example, the file per matter must contain summons, notice of intention to defend, pleadings, notice to discover, heads of arguments and so forth. They must be saved in the same order as per the requirements of the rules of the court, namely summons followed by notice to defend and so forth. It must be easy to page through these documents by using a touch screen or other e-technology device.³⁸ This will remove the pagination requirement contained in the rules.

³² For example, there are international standards set out to regulate data protection called Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data. There is also another standard that regulate consumer protection agreements called, Directive of the European Parliament and of the Council of 20 May 1997 on the protection on consumers in respect of distance contracts.

³³ UNCITRAL http://www.uncitral.org/uncitral/en/about_us.html (Date of use: 19 February 2018)

³⁴ UNCITRAL http://www.uncitral.org/uncitral/en/about_us.html (Date of use: 19 February 2018)

³⁴ This is possible in terms of Document Assembly Systems programme.

Document Assembly Systems

http://www.elawexchange.com/index.php?option=com_content&view=article&id=302&Itemid=334 (Date of use: 19 February 2018)

³⁵ Document Assembly Systems
http://www.elawexchange.com/index.php?option=com_content&view=article&id=302&Itemid=334 (Date of use: 19 February 2018)

³⁶ This can be possible in terms of Document Assembly Systems programme.

Document Assembly Systems

http://www.elawexchange.com/index.php?option=com_content&view=article&id=302&Itemid=334 (Date of use: 19 February 2018)

³⁷ This is doable and possible in terms of Document Assembly Systems programme.

Document Assembly Systems

http://www.elawexchange.com/index.php?option=com_content&view=article&id=302&Itemid=334 (Date of use: 19 February 2018).

³⁸ Fabian M Suchanek Best File Formats for Archiving

<http://suchanek.name/texts/archiving/>. (Date of use: 19 February 2018).

There should be a division, which accommodates existing sheriffs to perform their duties electronically.³⁹ Put differently, these duties will be carried out electronically using digital and e-technology as is the case in England.⁴⁰ Sheriffs will facilitate the service of the court papers through e-technology or digital means. In addition, return of service will be conducted electronically.⁴¹ The same applies to notices such as the notice to discover or notice of bar, and subpoena notices. All these notices, must be issued, filed, and served electronically and later archived in the court file through digital or e-technology means.

2.2 Trial proceedings

To a certain extent, courts embrace e-technology because trial proceedings are recorded.⁴² It is however, submitted that trial proceedings must be modified to cater for and facilitate digital recording. The researcher is of the view that this will enable witnesses, unable to be physically present at court, to testify through tele-conferences and other e-technology means.⁴³ It is suggested that witnesses should be able to testify through Skype.⁴⁴ This is significant in instances where witnesses are overseas.

E-technology can also be used to enable parties who would have given evidence through interrogatories and examination or commissioner, to testify live subject to cross- and re-examination via digital and e-technology means.⁴⁵ Witnesses issued with subpoena *duces tecum* should be able to testify and produce documents through digital and e-technology means.⁴⁶

³⁹ Practice Direction 510 – The Electronic Working Pilot Scheme.

⁴⁰ Practice Direction 510 – The Electronic Working Pilot Scheme.

⁴¹ This can be accomplished; England has 24 hours online programme in terms of Practice Direction 510 - The Electronic Working Pilot Scheme.

⁴² According to Humphries S, there are best digital video recorders that are currently used <http://www.toptenreviews.com/electronics/tv/best-dvrs/> (Date of use: 19 February 2018).

⁴³ This is possible in terms of Suzanne Humphries there are best digital video recorders that are currently used <http://www.toptenreviews.com/electronics/tv/best-dvrs/> (Date of use: 20 February 2018).

⁴⁴ According to Henshall A, Video Conferences can be conducted in business. Best Video Conferencing App: Skype vs Hangouts vs GoToMeeting v Zoom v Join.me vs Appear.in – Software Technology. <https://www.skype.com/en/> (Date of use: 19 February 2018).

⁴⁵ According to Henshall A, Video Conferences can be conducted in business. Best Video Conferencing App: Skype vs Hangouts vs GoToMeeting v Zoom v Join.me vs Appear. In – Software Technology. <https://www.skype.com/en/> (Date of use: 19 February 2018)

⁴⁶ According to Humphries S, there are best digital video recorders that are currently used <http://www.toptenreviews.com/electronics/tv/best-dvrs/> (Date of use: 19 February 2018)

During trial proceedings, judges and the magistrates must be able to page through court documents electronically or digitally or through touch screen e-technology instruments.⁴⁷ Legal representative should be allowed to argue and present their matters using digital or e-technology devices or instrument and they should be able to take the court through evidence in this manner.⁴⁸

2.3 *Post-trial proceedings*

It is submitted that when the court delivers judgment in favour of the plaintiff or the defendant, the system must be designed in a manner that will enable sheriffs to execute judgments and writs using e-technology or through digital means of communication.⁴⁹ For example, the system should enable the use of a device for example, such as a phone or a tablet to automatically execute court proceedings.⁵⁰ These should be directly linked to the system and the sheriffs should be able to execute and finalise court processes without necessarily being present in their offices.

The researcher recommends that the system should be designed in a manner that will enable the registrar, and the successful party, to conduct taxation without physically appearing at the office of the registrar.⁵¹ This may be achieved using teleconferences.⁵²

⁴⁷ This possible in terms of Humphries S there are best digital video recorders that are currently used <http://www.toptenreviews.com/electronics/tv/best-dvrs/> (Date of use: 19 February 2018)

⁴⁸ According to Henshall A, Video Conferences can be conducted in business. Best Video Conferencing App: Skype vs Hangouts vs GoToMeeting v Zoom v Join.me vs Appear.in – Software Technology. <https://www.skype.com/en/> (Date of use: 19 February 2018)

⁴⁹ In the United States of America writs are also executed electronically 'To obtain a writ of execution, an Affidavit and Request for Issuance of Writ of Execution must be filed electronically using the Court's CM/ECF System, unless exempted by Local Rule 5-4.2(a). If you are not represented by an attorney, you must file your documents in paper; unless you were granted permission to file documents electronically in your case. Step-by-step Instructions on how to obtain a writ of execution and FAQs are available here...' <https://www.cacd.uscourts.gov/court-procedures/filing-procedures/writ-execution> (Date of use: 20 February 2018)

⁵⁰ There is already a system designed to operate the products in a home situation. Use the Home app on iPhone, iPad and iPod touch With the Home app, you can securely control the products you use in your home—all from your iOS device. <https://support.apple.com/en-gb/HT204893> (Date of use: 20 February 2018)

⁵¹ The Constitutional Court held that the parties who are issued with subpoenas do not need to be physically present in *Minister of Police and another v Premier of the Western Cape* 2-13 ZACC 33 (CC); this shows the flexible approach followed by the courts in applying the rules of the courts.

⁵² 'Audio Conferencing is a cloud-based call conferencing solution that lets three or more

The researcher is of the view that a new system should be designed to automatically notify parties and remind a party to send the bill of costs to the registrar.⁵³ There should be a tele-conference, or digital video recording or Skype, or telephone conference to finalise the taxation.⁵⁴ When the registrar receives the bill of costs from the successful party, he/she should arrange a date for a tele-conference or a Skype telephonic discussion.⁵⁵

3. Conclusion

It is clear from the contents of the different chapters that South African law of civil procedure must be modified in accordance with the ECTA and other digital or e-technology law and standards. Proposed draft amendments satisfying this researchers recommendation are provided below.

participants join a call from wherever they are, right away – no special equipment or complicated meeting requests required'. <https://www.is.co.za/solution/audio-conferencing/> (Date of use: 19 February 2018)

⁵³ The courts may use Nayak's invented pop ups 'an email and task-managing software for Microsoft Outlook users'. United States Patent Application Publication <https://aplegal.com/wp-content/uploads/patents/Nayak,%20Vasant%20-%20Email%20and%20Taskmanaging%20Software.pdf?iframe=true&width=800&height=400> (Date of use: 19 February 2018)

⁵⁴ According to Henshall A, Video Conferences can be conducted in business. Best Video Conferencing App: Skype vs Hangouts vs GoToMeeting v Zoom v Join.me vs Appear.in – Software Technology. <https://www.skype.com/en/> (Date of use: 19 February 2018)

⁵⁵ According to Henshall A, Video Conferences can be conducted in business. Best Video Conferencing App: Skype vs Hangouts vs GoToMeeting v Zoom v Join.me vs Appear.in – Software Technology. <https://www.skype.com/en/> (Date of use: 19 February 2018)

4. Current statutory provisions and rules and recommendations

4.1 Superior Courts Act

Section	Current provision	Recommendation
35	<p>(1) A party to proceedings before any Superior Court in which the attendance of witnesses or production of any document or thing is required, <i>may procure the attendance of any witness or the production of any document or thing in the manner provided for the rules of that court.</i></p> <p>(2) <i>Whenever any person subpoenaed to attend any proceedings as a witness or to produce any document or thing –</i></p> <p>(a) fails without reasonable excuse to obey the subpoena and it appears from the return of the person who served such subpoena, or from evidence given under oath, that-</p> <p>(i) the subpoena was served upon the person to whom it is directed and that his or her reasonable expenses calculated in accordance with the tariff framed under section 37(1) have been paid or offered to him or her: or</p> <p>(ii) he or she is evading service; or</p> <p>(b) without leave of the court fails to remain in attendance, the court concerned may issue a warrant directing that he or she be arrested and brought before the court at a time and place stated in the warrant or as soon thereafter as possible.</p> <p>(3) A person arrested under any such warrant may be detained thereunder in any prison or other place of detention or in the custody of the person who is in charge of him or her, with a view to securing his or her presence as a witness or production of any document or thing at the proceedings concerned: Provided that any judge of the court concerned may release him or her on a recognisance with or without sureties to attend as a witness or to produce any document or thing as required.</p> <p>(4) Any person who subpoenaed to attend any proceedings as a witness or to produce any document or thing who</p>	<p>Section 35 A A party subpoenaed in terms of this Act and the rules and not residing within the jurisdiction of the court may give evidence through digital live or CCTV video recording, tele-conference, Skype or other means of e-technology, and such a witness should be able to take oath and testify live during court proceedings.</p> <p>Section 35 B A party issued with subpoenaed <i>duces tecum</i> and not residing or unable to physically attend court proceedings, must be given an opportunity to testify and produce such document through digital or e-technology means. Provided that such a witness sends the document to the registrar electronically or digitally or using other e-technology means of communications and such document is digitally tabled at the court on the day of the witness testimony. In addition, such witness must take oath and narrate the contents of the document to the court and be cross-examined and re-examined live during the proceedings.</p>

	<p>fails without reasonable excuse to obey such subpoena, is guilty of an offence and liable upon conviction to a fine or to imprisonment for a period not exceeding three months.</p> <p>(5) If a person who has entered into any recognisance in terms of subsection (3) to attend such proceedings as a witness or to produce any document or thing fails without reasonable excuse so to attend or to produce such document or thing, he or she forfeits his or her recognisance and is guilty of an offence and liable upon conviction to a fine or to imprisonment for a period not exceeding three months...'⁵⁶</p>	
36	<p>(1) Whenever any person who appears either in obedience to a subpoena or by virtue of a warrant issued under section 35 or who is present and is verbally required by the Superior Court concerned to give evidence in any proceedings-</p> <p>(a) Refuses to take an oath or to make an affirmation;</p> <p>(b) Having taken an oath or having made an affirmation, refuses to answer such questions as are put to him or her; or</p> <p>(c) <i>Refuses or fails to produce any document or thing which he or she is required to produce, without any just excuse for such refusal or failure, the court may adjourn the proceedings for any period not exceeding eight days and may, in the meantime, by warrant commit the person so refusing or failing to prison unless the person consents to do what is required of him or her before he or she is so committed to prison...</i>'⁵⁷</p>	<p>Section 36(1) (d)</p> <p>When a witness refuses to give evidence through digital e-technology, or tele-conference, or Skype, or means of e-technology devices or instrument, the court may automatically issue a warrant of arrest for such witness.</p>
39	<p>(1) The Constitutional Court and, in connection with any civil proceedings pending before it, any Division, may order that the evidence of a person be taken by means of interrogatories if-</p>	<p>Section 39 (7)</p> <p>The court may allow a witness to testify through digital technology use; or tele-conference; or Skype; or give oral testimony effected using e-technology instruments or</p>

⁵⁶ Section 35 of the Superior Courts Act.

⁵⁷ Section 36 of the Superior Courts Act.

	<p>(a) In the case of the Constitutional Court, the court deems it in the interests of justice; or</p> <p>(b) In the case of a Division, that person resides or is for the time being outside the area of jurisdiction of the court.</p> <p>(2) Whenever an order is made under subsection (1). The registrar of the court must certify that fact and transmit a copy of his or her certificate to a commissioner of the court, together with any interrogatories duly and lawfully framed which is desired to put to the said person and the fees and the amount of the expenses payable to the said person for his or her appearance as hereinafter provided.</p> <p>(3) Upon receipt of the certificate, the interrogatories and the amounts contemplated in subsection (2) the commissioner must in respect of the person concerned –</p> <p>(a) <i>summon that person to appear before him or her;</i></p> <p>(b) <i>upon his or her appearance, take that person's evidence as if he or she was a witness in a civil case in the said court;</i></p> <p>(c) <i>put to him or her the said interrogatories, with any other questions calculated to obtain full and true answers to the said interrogatories;</i></p> <p>(d) <i>take down or cause to be taken down the evidence so obtained; and</i></p> <p>(e) <i>transmit the evidence, certified as correct, to the registrar of the court wherein the proceedings in question are pending.</i></p> <p>(4) The commissioner must further transmit to the said registrar a certificate showing the amount paid to the person concerned in respect of the <i>expenses of his or her appearance and the cost</i> of the issue and service of the process for summoning such person before him or her.</p> <p>(5) Any person summoned to appear in terms of subsection (3) who without reasonable excuse fails to appear at the time and place mentioned in the summons, is guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding three months.</p>	<p>devices; instead of embarking on the interrogatories.</p>
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	(6) Any interrogatories taken and certified under the provisions of this section shall, subject to all lawful exceptions, be received as evidence in the proceedings concerned...'	
43	<p>(1) The sheriff must, subject to the applicable rules, execute all sentences, judgments, writs, summons, rules, orders, warrants, commands and processes of any Superior Court directed to the sheriff and must make return of the manner of execution thereof to the court and to the party at whose instance they were issued.</p> <p>(2) The return of the sheriff or a deputy sheriff of what has been done upon any process of a court, shall be <i>prima facie</i> evidence of the matters therein stated.</p> <p>(3) The sheriff must receive and cause to be detained all person arrested by order of the court or committed to his or her custody by any competent authority.</p> <p>(4) A refusal by the sheriff or deputy sheriff to do any act which he or she is by law required to do, is subject to review by the court concerned on application <i>ex parte</i> or on notice as the circumstances may require...'</p>	<p>Section 43A The sheriff must serve and execute court processes using e-technology or digital means in carrying out his/her functions and duties.</p> <p>Section 43(2)A When the sheriff effects service by electronic; or digital or e-technology means of communication or devices or instruments, it is sufficient to send an e-mail confirming that service was effected instead of using return of service certificate.</p>

4.2 Magistrates' Court Act

Section	Current provisions	Recommendation
17	The return of a sheriff or of any person authorized to perform any of the functions of a sheriff to any civil process of the court, shall be <i>prima facie</i> evidence of the matters therein stated... ⁵⁸	<p>Section 17 A When parties resort to e-technology means of communication and there is evidence that service of the court documents is carried out effectively; electronically or through digital e-technology means; it is sufficient to send an e-mail to the court confirming that service was affected instead of issuing return of service certificate.</p>

31(1)	The sheriff shall, if required by the plaintiff and at such plaintiff's expense, make an inventory of such furniture or effects... ⁵⁹	Section 31(1) A Where necessary and possible, the sheriff may use digital e-technology or a digital video recording; or CCTV recording to conduct an inventory and there must be a device that the sheriff uses directly linked to the system that automatically records assets subject to attachment.
51(2)(a)	If any person, being duly subpoenaed to give evidence or to produce any books, papers or documents in his possession or under his control which the party requiring his attendance desires to show in evidence, fails, without lawful excuse, to attend or to give evidence or to produce those books, papers or documents according to the subpoena or, unless duly excused, fails to remain in attendance throughout the trial, the court may, upon being satisfied upon oath or by the return of the sheriff that such person has been duly subpoenaed and that his reasonable expenses, calculated in accordance with the tariff prescribed under section 51 <i>bis</i> , have been paid or offered to him, impose upon the said person a fine not exceeding R300, and in default of payment, imprisonment for a period not exceeding three months, whether or not such person is otherwise subject to the jurisdiction of the court... ⁶⁰	Section 51(2) A When a witness subpoenaed to give evidence or subpoenaed to produce a document, fails or refuses to give such evidence through digital e-technology means; or tele-conference; or Skype; or other e-technology means the court; may issue a fine or arrest such a person as may be deemed necessary by the court.
52(1)	Whenever a witness resides or is in an area of jurisdiction other than that wherein the case is being heard, the court may, if it appears to be consistent with the ends of justice, upon the application of either party approve of such interrogatories as either party shall desire to have put to such witness and shall transmit the same, together with any further interrogatories framed by the court, to the court of the area of jurisdiction within which such witness resides or is....	Section 52(1) A The court may grant an order that allows the use of digital e-technology; tele-conference; Skype; or CCTV video recording in the place of interrogatories, commissions, where facilities are available within the area in which a witness resides.
54	(1) The court may at any stage in any legal proceedings in its discretion <i>suo motu</i> or upon the request in	Section 54(1) A The court may grant an order requiring parties to conduct pre-

⁵⁹ Section 31 of the Magistrates' Courts' Act.

⁶⁰ Section 51 of the Magistrates' Courts' Act.

	<p>writing of either party direct the parties or their representatives to appear before it in chambers for a conference to consider-</p> <p>(a) the simplification of the issues;</p> <p>(b) the necessity or desirability of amendments to the pleadings;</p> <p>(c) the possibility of obtaining admissions of fact and of documents with a view to avoiding unnecessary proof;</p> <p>(d) the limitation of the number of expert witnesses;</p> <p>(e) such other matters as may aid in the disposal of the action in the mostexpeditious and least costly manner...⁶¹</p>	<p>trial conference through digital video conference or tele-conference to implement the provisions set out in section 54(1).</p>
57	<p>(1) If any person (in this section called the defendant) has received a letter of demand or has been served with a summons demanding payment of any debt, the defendant may in writing-</p> <p>(a) admit liability to the plaintiff for the amount of the debt and costs claimed in the letter of demand or summons or for any other amount;</p> <p>(b) offer to pay the amount of the debt and costs for which he admits liability, in instalments or otherwise;</p> <p>(c) undertake on payment of any instalment in terms of his offer to pay the collection fees for which the plaintiff is liable in respect of the recovery of such instalment; and</p> <p>(d) agree that in the event of his failure to carry out the terms of his offer the plaintiff shall, without notice to the defendant, be entitled to apply for judgment for the amount of the outstanding balance of the debt for which he admits liability, with costs, and for an order of court for payment of the judgment debt and costs in instalments or otherwise in accordance with his offer, and if the plaintiff or his attorney accepts the said offer, he shall advise the defendant of such acceptance in writing by registered letter...⁶²</p>	<p>Section 57(1) (dd)</p> <p>Legal representative for the plaintiff may accept the undertaking required in terms of this section by sending an e-mail to the defendant in the place of a registered letter.</p>
74Q	<p>(4) Any order rescinding an administration order shall be in the form prescribed in therules and a copy thereof shall be delivered personally or sent by post by</p>	<p>Section 74Q (4) A</p> <p>Rescission orders granted by the court may be delivered using electronic communications or</p>

⁶¹ Section 54 of the Magistrates' Court Act.

⁶² Section 57 of the Magistrates Courts Act.

	theadministrator to the debtor and to each creditor, who shall also be informed of the debtor's last known address by the administrator...' ⁶³	digital e-technology means of communications. It is sufficient to send an e-mail to the debtor and creditor and attach such order to the e-mail.
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4.3 Small Claims Court Act

Section	Current provision	Recommendation
29	(1) The plaintiff shall deliver a summons as prescribed personally or through his authorized representative to the clerk of the court, together with a copy of a written demand which was on a prior occasion delivered to the defendant by the plaintiff by hand or by registered post and in which the defendant was, notwithstanding anything to the contrary in any law contained, allowed at least 14 days, calculated from the date of receipt of that demand by the defendant, to satisfy the plaintiff's claim...' ⁶⁴	Section 29(1) (aa) Summons may be delivered via electronic communications or other means of digital or e-technology instruments or devices.

4.4 Sheriffs Act

Section	Current provision	Recommendation
3	(1) Subject to the provisions of this section, a sheriff shall perform within the area of jurisdiction of the lower or superior court for which he has been appointed the functions assigned by or under any law to a sheriff of that court. (2) (a) The Minister may describe one or more areas within the area of jurisdiction of a lower or superior court and allocate any such area to a sheriff of that court. (b) The Minister may, after consultation with the Board, appoint more than one sheriff for that particular area to perform the duties and functions assigned to a sheriff. [Para. (b) added by s. 2 of Act 74 of 1998.] (3) A sheriff to whom an area has been allocated under subsection (2),	Section 3(5) The duties and the functions of sheriffs shall be affiliated with those functions performed and operated by the <i>Centre for Digital and E-technology</i> .

⁶³ Section 74Q of the Magistrates' Courts Act.

⁶⁴ Section 29 of the Small Claims Court Act.

	shall perform his functions within that area. (4) The Minister may at any time alter the description of an area referred to in subsection (2)... ⁶⁵	
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4.5 National Credit Act

Section	Current provision	Recommendation
129(1)	(1) If the consumer is in default under a credit agreement, the credit provider- (a) may draw the default to <i>the notice of the consumer in writing and propose that the consumer refer the credit agreement to a debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction, with the intent that the parties resolve any dispute under the agreement or develop and agree on a plan to bring the payments under the agreement up to date...</i> ⁶⁶	Section 129(1) (aa) Notice that must be issued to the debtor using electronic communications; digital or e-technology means; or the Facebook page of the debtor when the whereabouts of the debtor are unknown.
169	(1) In any proceedings in any court for the recovery of debt in terms of a credit (a) alleges that the cost of credit claimed by, or made to, the credit provider (b) requests that the credit provider be called as a witness to prove the amount of debt claimed to be owing, the court must not give judgment until it has afforded an opportunity for the consumer to examine the credit provider in relation to the debt claimed to be owing, unless it appears to the court that the consumer's allegation is prima facie without foundation, or 40 that examination of the credit provider is impracticable. (2) In any criminal proceedings in terms of this Act-agreement, if the consumer- exceeds the maximum permitted in terms of this Act; and 35... ⁶⁷	Section 169(1) (c) The documents required in compliance with this Act may also be served via electronic communications; digital or other e-technology means of communications.

⁶⁵ Section 3 of the Sheriffs Act.

⁶⁶ Section 129 of the National Credit Act.

⁶⁷ Section 169 of the National Credit Act.

4.6 Consumer Protection Act

Section	Current provision	Recommendation
102(1)	(1) At any time during an investigation being conducted in terms of section 72(1)(d), the Commissioner may issue a summons to any person who is believed to be able to furnish any information on the subject of the investigation, or to have possession or control of any book, document or other object that has a bearing on that subject— (a) to appear before the Commission, or before an inspector or independent investigator, to be questioned at a time and place specified in the summons; or (b) to deliver or produce to the Commission, or to an inspector or independent investigator, any book, document or other object referred to in paragraph (a) at a time and place specified in the summons... ¹⁶⁸	Section 102(1) A The commissioner may issue summons via electronic means or digitally or using e-technology devices.
102(2)	'...A summons contemplated in subsection (1)— (a) must be signed by the Commissioner, or by an employee of the Commission designated by the Commissioner; and (b) may be served in the same manner as a subpoena in a criminal case issued by the magistrate's court...'	Section 102 (2) A The signature of the Commissioner includes advanced electronic signature as defined by section 1 of the ECTA.
118	'... Unless otherwise provided in this Act, a notice, order or other document that, in terms of this Act, must be served on a person, will have been properly served when it has been either— (a) delivered to that person; or (b) sent by registered mail to that person's last known address...' ¹⁶⁹	Section 118 A The service of court papers relevant to the proceedings may be effected through electronic communications; digital e-technology and other means of e-technology.

4.7 Constitutional Court Rules

Rule	Current provision	Recommendation
1(4)	(4) Notices, directions or other communications in terms of these rules may be given or made by registered post or by facsimile or	Rule 1(4) AA When parties to the proceedings resort to the use of electronic communications to affect court

⁶⁸ Section 102 of the Consumer Protection Act.

⁶⁹ Section 118 of the Consumer Protection Act.

	<p>other electronic copy: Provided that, if a notice or other communication is given by electronic copy, the party giving such notice or communication shall forthwith lodge with the Registrar a hard copy of the notice or communication, with a certificate signed by such a party verifying the date of such communication or notice.'</p>	<p>processes; the documents or papers will be archived in the court's file by the archives department and the parties shall not be obliged to submit hard-copies thereafter.</p>
10	<p>(1) Subject to these rules, any person interested in any matter before the Court may, with the written consent of all the parties in the matter before the Court, given not later than the time specified in subrule (5), be admitted therein as an <i>amicus curiae</i> upon such terms and conditions and with such rights and privileges as may be agreed upon in writing with all the parties before the Court or as may be directed by the Chief Justice in terms of subrule (3).</p> <p>(2) The written consent referred to in subrule (1) shall, within five days of it having been obtained, be lodged with the Registrar and the <i>amicus curiae</i> shall, in addition to any other provision, comply with the times agreed upon for the lodging of written argument.</p> <p>(3) The Chief Justice may amend the terms, conditions, rights and privileges agreed upon as referred to in subrule (1).</p> <p>(4) If the written consent referred to in subrule (1) has not been secured, any person who has an interest in any matter before the Court may apply to the Chief Justice to be admitted therein as an <i>amicus curiae</i>, and the Chief Justice may grant such application upon such terms and conditions and with such rights and privileges as he or she may determine.</p> <p>(5) If time limits are not otherwise prescribed in the directions given in that matter an application pursuant to the provisions of subrule (4) shall be made not later than five days after the lodging of the respondent's written submissions or after the time for lodging such submissions has expired.</p>	<p>Rule 10 A</p> <p>The registrar shall keep record of court papers submitted through electronic means; digitally or e-technology means, and these shall be archived in a court files, which shall only be available to court officials. If any party requests access to such records, the party concerned shall make a written request to the registrar to have access to such a record.</p>

	<p>(6) An application to be admitted as an <i>amicus curiae</i> shall-</p> <p>(a) briefly describe the interest of the <i>amicus curiae</i> in the proceedings;</p> <p>(b) briefly identify the position to be adopted by the <i>amicus curiae</i> in the proceedings; and</p> <p>(c) set out the submissions to be advanced by the <i>amicus curiae</i>, the irrelevance to the proceedings and his or her reasons for believing that the submissions will be useful to the Court and different from those of the other parties.</p> <p>(7) An <i>amicus curiae</i> shall have the right to lodge written argument, provided that such written argument does not repeat any matter set forth in the in the argument of the other parties and raises new contentions which may be useful to the Court.</p> <p>(8) Subject to the provisions of rule 31, an <i>amicus curiae</i> shall be limited to the record on appeal or referral and the facts found proved in other proceedings and shall not add thereto and shall not present oral argument.</p> <p>(9) An order granting leave to be admitted as an <i>amicus curiae</i> shall specify the date of lodging the written argument of the <i>amicus curiae</i> or any other relevant matter.</p> <p>(10) An order of Court dealing with costs may make provision for the payment of costs incurred by or as a result of the intervention of an <i>amicus curiae</i>.</p> <p>(11) The provisions of rule 1(3) shall be applicable, with such modifications as may be necessary, to an <i>amicus curiae</i>...⁷⁰</p>	
20	<p>(1) If leave to appeal is given in terms of rule 19, the appellant shall note and prosecute the appeal as follows:</p> <p>(a) The appellant shall prepare and lodge the appeal record with the Registrar within such time as may be fixed by the Chief Justice in directions.</p> <p>(b) Subject to the provisions of subrule (1)(c) below, the appeal record shall consist of the judgment of the court from which the appeal is noted,</p>	<p>Rule 20A</p> <p>The court shall no longer require parties to the proceedings to paginate the court's file. When civil proceedings are commenced; it shall be sufficient to number the pages on the pleadings and prepare an index that refers to the documents' names saved in different files used during the proceedings. The</p>

	<p>together with all the documentation lodged by the parties in that court and all the evidence which may have been led in the proceedings and which may be relevant to the issues that are to be determined.</p> <p>(c) (i) The parties shall endeavour to reach agreement on what should be included in the record and, in the absence of such agreement, the appellant <i>shall apply</i> to the Chief Justice for directions to be given in regard to the compilation of the record.</p> <p>(ii) Such application shall be made in writing and shall set out the nature of the dispute between the parties in regard to the compilation of the record and the reasons for the appellant's contentions.</p> <p>(iii) The respondent may respond to the application within 10 days of being served with the application and shall set out the reasons for the respondent's contentions...</p> <p>(2) (a) One of the copies of the record lodged with the Registrar shall be certified as correct by the Registrar of the court appealed from.</p> <p>(b) Copies of the record shall be clearly typed on stout A4-size paper, double-spaced in black record ink, on one side of the paper only.</p> <p>(c) Legible documents that were typed or printed in their original form such as cheques and the like shall not be retyped and clear photocopies on A4-size paper shall be provided instead.</p> <p>(d) <i>The pages shall be numbered clearly and consecutively and every tenth line on each page shall be numbered and the pagination used in the court a quo shall be retained where possible.</i></p> <p>(e) <i>Bulky records shall be divided into separate conveniently-sized volumes of approximately 100 pages each. The record shall be securely bound in book format to withstand constant use and shall be so bound that upon being used will lie open without manual or other restraint.</i></p> <p>(f) All records shall be securely bound in suitable covers disclosing the case</p>	<p>court must be able to page through these documents using touch screen digital devices or any other e-technology mode or instrument that the court considers useful and necessary.</p> <p>Rule 20AA The court shall no longer require manual numbering of pages of the record, it shall be sufficient to ensure that the pages are correctly numbered and that there is an index or table of content prepared that will highlight the names of the documents and page numbers. If there are added documents that are filed, the parties may scan these documents; name them and file them under one matter. The court should be able to access these documents through digital and e- technology means before, during and after the proceedings.</p> <p>Rule 20AAA The court shall no longer require parties to bind bulky documents that are electronically served, issued, filed and lodged. The bulky documents must be named and saved in an archived file that will enable the court to easily access same.</p> <p>Rule 20(2) (i) A The court shall no longer require parties to file 13 copies when all the court documents and papers are issued, served, filed and lodged through electronic means. These documents should be kept in an archive file stored by the archive department.</p>
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	<p>number, names of the parties, the volume number and the numbers of the pages contained in that volume, the total number of volumes, the court <i>aquo</i> and the names of the attorneys of the parties.</p> <p>(g) The binding required by this rule shall be sufficiently secure to ensure the stability of the papers contained within the volume; and where the record consists of more than one volume, the number of each volume and the number of the pages contained in a volume shall appear on the upper third of the spine of the volume.</p> <p>(h) Where documents are lodged with the Registrar, and such documents are recorded on a computer disk, the party lodging the document shall where possible also make available to the Registrar a disk containing the file in which the document is contained, or transmit an electronic copy of the document concerned by e-mail in a format determined by the Registrar which is compatible with software that is used by the Court at the time of lodgement, to the Registrar at: registrar@concourt.org.za: Provided that the transmission of such copy shall not relieve the party concerned from the obligation under rule 1(3) <i>to lodge the prescribed number of hard copies of the documents so lodged.</i></p> <p>(i) If a disk is made available to the Registrar the file will be copied and the disk will be returned to the party concerned. Where a disk or an electronic copy of a document other than a record is provided, <i>the party need lodge only 13 copies of the document concerned with the Registrar.</i></p> <p>(3) If a record has been lodged in accordance with the provisions of paragraphs (b) and (c) of subrule (1), the Registrar <i>shall cause a notice to be given to the parties</i> to the appeal requiring-</p> <p>(a) the appellant to lodge with the Registrar written argument in support of the appeal within a period determined by the Chief Justice and specified in such notice; and</p>	
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	<p>(b) the respondent to <i>lodge with the Registrar written argument in reply to the appellant's argument</i> by a specified date determined by the Chief Justice, which shall be subsequent to the date on which the appellant's argument was served on the respondent...</p> <p>(4) The appellant <i>may lodge with the Registrar written argument in answer to the respondent's argument within 10 days from the date on which the respondent's argument was served on the appellant...</i></p> <p>(6) Subject to the provisions of subrule (5), the Chief Justice shall determine the date on which oral argument will be heard, and the Registrar shall within five days of such determination notify all parties to the appeal of the date of the hearing by <i>registered post or facsimile...</i>⁷¹</p>	
22	<p>(1) Rules 17 and 18 of the Supreme Court of Appeal Rules regarding taxation and attorneys' fees shall apply, with such modifications as may be necessary.</p> <p>(2) In the event of oral and written argument, a fee for written argument may in appropriate circumstances be allowed as a separate item...⁷²</p>	<p>Rule 22A</p> <p>The successful party to the civil proceedings who is entitled to party to party costs shall send the bill of costs to the registrar of the court within 20 days after the delivery of the judgment. Upon receipt of the bill of costs the registrar must arrange for a digital recording or skype conference or tele-conference to conduct digital taxation within 10 days after receiving the bill of costs. The successful party must thoroughly prepare for the taxation process and the same must be finalised by the registrar of the court through digital recording, skype conference or tele-conference on the date set down by the registrar; unless there is a need to extend the tele-conference taxation process to another date.</p>

⁷¹ Rule 20 of the Constitutional Court Rules.

⁷² Rule 22 of the Constitutional Court Rules.

4.8 Supreme Court of Appeal Rules

Rule	Current provision	Recommendation
Def	‘... "lodging of documents with the registrar" means the lodging of documents with the registrar through an attorney practising in Bloemfontein or, if a party is not represented by an attorney, by registered post or by that party personally, after prior service of copies of such documents on any other party...’ ⁷³	Definition ‘Lodging’ shall include submitting court papers through e-technology; digital or other electronic means of communications.
4	<p>(1) (b) The registrar may provisionally accept, in lieu of the original document tendered for lodging, a copy (including a facsimile or other electronic copy) thereof, but <i>the original shall be filed</i> within 10 days thereafter.</p> <p>(2)(a) A notice of appeal or the first application in an intended appeal shall be numbered by the registrar with a consecutive number for the year during which it is filed.</p> <p>(b) Every document lodged afterwards in such a case <i>shall be marked with that number by the party lodging it and shall not be received by the registrar until so marked.</i></p> <p>(c) All the documents delivered to the registrar to be filed in a case <i>shall be filed by the registrar in a case file under the number of such case.</i></p> <p>(d) The registrar shall maintain the Court's records and shall not permit any of them to be removed from the court building, except as authorised by the registrar.</p> <p>(e) Any document lodged with the registrar and made part of the Court's records shall not thereafter be withdrawn permanently from the official court files...</p> <p>(3) <i>Copies of any document forming part of the Court's records may be made by any person in the presence of the registrar: Provided that the registrar shall, at the request of a party, make a copy of a recorded order, settlement or judgment on payment of the</i></p>	Rule 4AA The court shall no longer require the registrar to number the documents that commence the civil proceedings when the parties to the proceedings use electronic communications to issue, serve and file the papers. It shall be sufficient to lodge an appeal electronically and these will be saved in an electronic court file and a number shall automatically be allocated to a matter by the system when these documents are received for the first time. It shall be the responsibility of the registrar to ensure that the courts' file is archived and kept in safe and protected software and computer, which will prevent access by other people. If any of the parties to the proceedings needs to access the documents, such a party shall make a written request to the registrar.

	prescribed court fees and the registrar shall certify that copy or photocopy to be a true copy of the original... ⁷⁴	
6	<p>(1) In every matter where leave to appeal is by law required of the Court, an application therefor <i>shall be lodged in duplicate with the registrar</i> within the time limits prescribed by that law...</p> <p>(5) Every application, answer and reply -</p> <p>(a) shall -</p> <p>(i) be clear and succinct and to the point;</p> <p>(ii) furnish fairly all such information as may be necessary to enable the Court to decide the application;</p> <p>(iii) deal with the merits of the case only in so far as is necessary for the purpose of explaining and supporting the particular grounds upon which leave to appeal is sought or opposed;</p> <p>(iv) be properly and separately paginated; and</p> <p>(b) shall not -</p> <p>(i) be accompanied by the record, or</p> <p>(ii) traverse extraneous matters.</p> <p>(6) The judges considering the application may call for -</p> <p>(a) submissions or further affidavits;</p> <p>(b) the record or portions of it; and</p> <p>(c) additional copies of the application...</p> <p>(8) If the party concerned fails to comply with a direction by the registrar or fails to cure the defects in the application within the period directed, the registrar shall refer the matter to the judges assigned to the application who may dispose of it in its incomplete form.</p> <p>(1) An appellant <i>in a civil case shall lodge a notice of appeal with the registrar and the registrar of the court a quo</i> within one month after the date of -</p> <p>(a) the granting of the judgment or order appealed against where leave to appeal</p> <p>(b) the granting of leave to appeal where leave to appeal is required; or</p> <p>(c) the setting aside of a direction of a high court in terms of section 20(2)(b) of the Supreme Court Act, 1959 (Act No. 59 of 1959).</p> <p>(2) A respondent in a civil appeal who intends to cross-appeal shall, within</p>	<p>Rule 6A</p> <p>The court shall purchase software that will be able to 'collect', 'store', 'use' and 'distribute'⁷⁶ lucrative volumes of documents.</p> <p>Rule 6AA</p> <p>The court shall no longer require parties to paginate the courts' file or the actual manual numbering of the pages of the record, it shall be adequate to ensure that the pages are correctly numbered and that there is an index or table of content prepared that will highlight the names of the documents and page numbers. If there are added documents that are filed, the parties may scan the documents; name them and file them under one matter on the system. The court should be able to access these documents through digital and e-technology means before, during and after the proceedings.</p>

⁷⁴ Rule 4 of the Supreme Court of Appeal Rules.

⁷⁶ As defined in the definition of data in terms of section 1 of the ECTA.

	one month after receipt of the appellant's notice of appeal, <i>lodge a notice of the cross-appeal with the registrar and with the registrar of the court a quo...</i> ⁷⁵	
8	<p>'...(1)An appellant shall within three months of the lodging of the notice of appeal <i>lodge with the registrar six copies of the record of the proceedings in the court a quo and deliver to each respondent such number of copies as may be considered necessary or as may reasonably be requested by the respondent...</i></p> <p>...(4)(a)If an appeal is withdrawn or has lapsed and no record has been lodged with the registrar, a respondent who has noted a cross-appeal may, within one month from such withdrawal or lapsing of the appeal, <i>notify the registrar in writing that he or she desires to prosecute the cross appeal...</i></p> <p>'...(6)(c)<i>The pages shall be numbered clearly and consecutively, and every tenth line on each page shall be numbered and the pagination used in the court a quo shall be retained where possible...</i></p> <p>'...(7)(a) A core bundle of documents shall be prepared if to do so is appropriate to the appeal.</p> <p>(b)<i>The core bundle shall consist of the material documents of the case in a proper, preferably chronological, sequence.</i></p> <p>(c)Documents contained in the core bundle shall be omitted from the record, but the record shall indicate where each such document is to be found in the core bundle...'⁷⁷</p>	<p>Rule 8 A</p> <p>The court shall no longer require the parties to file 6 hard-copies when all the court documents and papers are issued, served, filed and lodged through electronic means. These documents should be sent via an e-mail or other digital or e-technology means of communications to the respondents and the court of first instance. The said documents must be kept in an archive file that will be stored by the new archive department.</p> <p>Rule 8AA</p> <p>A party who wishes to prosecute may notify the registrar by either sending an e-mail or by using other means of digital or e-technology means of communications. When parties use electronic communications to issue, serve and file the courts' papers, the court will keep the way these documents are saved on the system. If and when necessary, the party to the proceedings may make use of a new electronic index or table of contents instead of paginating the courts' file.</p> <p>Rule 8 BB</p> <p>The court shall accept the electronic archived documents as courts' papers, and the court shall no longer need the parties to prepare a core bundle.</p>
13(1)	'...The registrar shall, subject to the directions of the President, notify each party <i>by registered letter</i> of the date of hearing...' ⁷⁸	<p>Rule 13A</p> <p>The set down notice may be sent to the parties concerned by e-mail or other digital e-technology means of communications.</p>

⁷⁵ Rule 6 of the Supreme Court of Appeal Rules.

⁷⁷ Rule 8 of the Uniform Rules of Court.

⁷⁸ Rule 13 of the Rules of Supreme Court of Appeal.

17(1)	<p>‘...The costs Incurred In any appeal or application shall be taxed by the registrar, who, when exercising this function, shall be called the taxing matter, but his or her taxation shall be subject to review of the court...’⁷⁹</p>	<p>Rule 17A</p> <p>The successful party to the civil proceedings who is entitled to party to party costs shall send the bill of costs to the registrar of the court within 20 days after the delivery of the judgment. Upon receipt of the bill of costs the registrar must arrange for a digital recording or skype conference or tele-conference to conduct digital taxation within 10 days after receiving the bill of costs. The successful party must thoroughly prepare for the taxation process and the same must be finalised by the registrar of the court through digital recording, skype conference or tele-conference on the date set down by the registrar; unless there is a need to extend the tele-conference taxation process to another date.</p>
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4.9 Uniform Rules of Court

Rule	Current provision	Recommendation
Def	<p>‘...deliver’ shall mean serve copies on all parties and file the original with the registrar...’⁸⁰</p>	<p>Definitions</p> <p>‘Signature required in terms of the rules’ shall include advanced electronic signature as defined by section 1 of the ECTA and the Law Society guidelines.</p> <p>‘Delivery’ shall include electronic communications; digital or e-technology means of ensuring that the court papers are properly received by either party to the proceedings.</p> <p>‘Filing’ shall include filing through electronic communications or using digital and e-technology means of communications.</p> <p>‘Issuing’ shall include presentation of summons or any other court documents electronically or digitally or through other proficient e-</p>

⁷⁹ Rule 17 of the Rules of Supreme Court of Appeal.

⁸⁰ Rule 1 of the Uniform Rules of court.

		<p>technology means of communications; to the registrar of the court and the registrar in return shall insert an advanced electronic signature into document to complete the filing process.</p> <p>'Service' shall include sending electronic e-mail or using Facebook;⁸¹ other social media and e-technology or digital means of communications; without necessarily obtaining a court to ensure that the courts' papers are proficiently served on the other party. Thereafter, proof of such service must be provided to the court by attaching the screen dump for example into subsequent court' papers or any other digital or e-technology evidence, which will confirm that service was successfully effected.</p>
5	<p>(1) Save by leave of the court no process or document whereby proceedings are instituted shall be served outside the Republic.</p> <p>(2) <i>'...If such manner be other than personal service, the application shall further set forth the last-known whereabouts of the person to be served and the inquiries made to ascertain his present whereabouts. Upon such application the court may make such order as to the manner of service as to it seems meet and shall further order the time within which notice of intention to defend is to be given or any other step that is to be taken by the person to be served. Where service by publication is ordered, it may be in a form as near as may be in accordance with Form 1 of the First Schedule, approved and signed by the registrar...'</i>⁸²</p>	<p>Rule 5A</p> <p>When the court grants an order to effect edictal citation; it will be sufficient to enforce the order by sending the court papers that are desired to be served on the other party by sending electronic e-mail or Facebook⁸³ or by using digital or other e-technology means of communications.</p>
6	<p>(1) Save where proceedings by way of petition are prescribed by law, every application shall be brought on notice of motion supported by an affidavit as</p>	<p>Rule 6A</p> <p>Application proceedings may be commenced and issued; served; and filed through electronic</p>

⁸¹ CMC Woodworking machinery (Pty) Ltd v Odendaal Kitchens para 1-13.

⁸² Rule 5 of the Uniform Rules of Court.

⁸³ CMC Woodworking machinery (Pty) Ltd v Odendaal Kitchens para 1-13.

	<p>to the facts upon which the applicant relies for relief...</p> <p>(4) (a) Every application brought <i>ex parte</i> (whether by way of petition or upon notice to the registrar supported by an affidavit as aforesaid) shall be filed with the registrar and set down, before noon on the court day but one preceding the day upon which it is to be heard. If brought upon notice to the registrar, such notice shall set forth the form of order sought, specify the affidavit filed in support thereof, request him to place the matter on the roll for hearing, and be as near as may be in accordance with Form 2 of the First Schedule...</p> <p>6(5) (b) In such notice the applicant shall appoint an address within eight kilometres of the office of the registrar, at <i>which he will accept notice and service of all documents in such proceedings</i>, and shall, subject to the provisions of section 27 of the Act, set forth a day, not less than five days after service thereof on the respondent, on or before which such respondent is required to notify the applicant, in writing, whether he intends to oppose such application, and shall further state that if no such notification is given the application will be set down for hearing on a stated day, not being less than 10 days after service on the said respondent of the said notice...⁸⁴</p>	<p>communications or by using digital or any other e-technology means of communications.</p>
8	<p>(2) Such summons <i>shall be issued by the registrar</i> and the provisions of subrules (3) and (4) of rule 17 shall <i>mutatis mutandis</i> apply.</p> <p>(3) Copies of all documents upon which the claim is founded shall be annexed to the summons and served with it...⁸⁵</p>	<p>Rule 8A</p> <p>1. The registrar of the court may issue summons electronically or by using digital or e-technology means of communications.</p> <p>2. Where parties use electronic means of delivering, serving and filing, there shall be no need to use hard-copies.</p>

⁸⁴ Rule 6 of the Uniform Rules of Court.

⁸⁵ Rule 8 of the Uniform Rules of Court.

13	<p>(3) (a) The third party notice, accompanied by a copy of all pleadings filed in the action up to the date of service of the notice, <i>shall be served on the third party and a copy of the third party notice, without a copy of the pleadings filed in the action up to the date of service of the notice, shall be filed with the registrar and served on all other parties before the close of pleadings in the action in connection with which it was issued...</i>⁸⁶</p>	<p>Rule 13A</p> <p>The processes followed in third party proceedings may be conducted electronically or by using digital or e-technology means of communications. This means that service and filing of the court papers in third party proceedings may be effected and operated electronically or by using digital or any other e-technology means of communications.</p>
17	<p>(1) Every person making a claim against any other person may, through the office of the registrar, sue out a summons or a combined summons addressed to the sheriff directing him to inform the defendant <i>inter alia</i> that, if he disputes the claim, and wishes to defend he shall-</p> <p>(a) within the time stated therein, give notice of his intention to defend;</p> <p>(b) thereafter, if the summons is a combined summons, within twenty days after giving such notice, deliver a plea (with or without a claim in reconvention), an exception or an application to strike out...⁸⁷</p>	<p>Rule 17A</p> <p>The registrar may issue summons electronically or by using digital or any other e-technology means of communications when the proceedings; are commenced in this manner. If parties do not have access to e-mail or e-technology or digital or social media means of communications at the initial time of commencing the civil proceedings and use manual processes but later on gain or have access to e-mail; digital or e-technology means of communications. Nothing precludes such parties to continue with the proceedings by using e-mail; digital or e-technology means of communications up until the post-trial stage or process.</p>
19	<p>(1) Subject to the provisions of section 27 of the Act, the defendant in every civil action shall be allowed ten days after service of summons on him within which <i>to deliver a notice of intention to defend, either personally or through his attorney</i>: Provided that the days between 16 December and 15 January, both inclusive, shall not be counted in the time allowed within which to deliver a notice of intention to defend...⁸⁸</p>	<p>Rule 19A</p> <p>When summons is issued to the defendant electronically or by using digital or e-technology means of communications, the defendant may also serve the notice of intention to defend the matter by using the same, thus, electronically or by using digital or e-technology means of communications.</p>

⁸⁶ Rule 13 of the Uniform Rules of Court.

⁸⁷ Rule 17 of the Uniform Rules of Court.

⁸⁸ Rule 19 of the Uniform Rules of Court.

20	(1) In all actions in which the plaintiff's claim is for a debt or liquidated demand and the defendant has delivered notice of intention to defend, the plaintiff shall, except in the case of a combined summons, within fifteen days after his receipt thereof, <i>deliver a declaration...</i> ⁸⁹	Rule 20A The plaintiff may deliver the declaration to the defendant through electronic communications or by using digital or e-technology means of communications. Such delivery shall be conducted after the notice of intention to defend is received.
21	'...(2) After the close of pleadings any party may, not less than twenty days before trial, deliver a notice requesting only such further particulars as are strictly necessary to enable him to prepare for trial. Such request shall be complied with within ten days after receipt thereof...' ⁹⁰	Rule 21A The parties to the proceedings may request further particulars through electronic communications or by using digital or any other e-technology means of communications. The party who is required to provide further particulars may also do so by using digital or e-technology means of communications in order to comply with such request
22	'...(1) Where a defendant has delivered notice of intention to defend, he shall within twenty days after the service upon him of a declaration or within twenty days after delivery of such notice in respect of a combined summons, deliver a plea with or without a claim in reconvention, or an exception with or without application to strike out...' ⁹¹	Rule 22A The defendant may file a plea electronically or by using digital or e-technology means of communications after receipt of the declaration.
23(1)	...opposing party may, within the period allowed for filing any subsequent pleading, deliver an exception thereto and may set it down for hearing in terms of paragraph (f) of subrule (5) of rule (6): Provided that where a party intends to take an exception that a pleading is vague and embarrassing he shall within the period allowed as aforesaid by notice afford his opponent an opportunity of removing the cause of complaint within 15 days...' ⁹²	Rule 23A A notice to except or strike out may be delivered electronically or by means of digital or any other e-technology modes of communications.
31(1)	'...(b) Such confession shall be signed by the defendant personally and his signature shall either be witnessed by an attorney acting for him, not being the	Rule 31A The defendant may insert an advanced electronic signature ⁹⁴ into the court papers instead of

⁸⁹ Rule 20 of the Uniform Rules of Court.

⁹⁰ Rule 21 of the Uniform Rules of Court.

⁹¹ Rule 22 of the Uniform Rules of Court.

⁹² Rule 23 of the Uniform Rules of Court.

⁹⁴ As defined in section 1 of the ECTA.

	attorney acting for the plaintiff, or be verified by affidavit... ⁹³	signing them in front of the witnesses.
35	(1) Any party to any action may require any other party thereto, by notice in writing, to make discovery on oath within twenty days of all documents and tape recordings relating to any matter in question in such action(whether such matter is one arising between the party requiring discovery and the party required to make discovery or not) which are or have at any time been in the possession or control of such other party. Such notice shall not, save with the leave of a judge, be given before the close of pleadings... ⁹⁵	Rule 35A The party who requires another party to disclose documents or information relevant to the proceedings may issue a notice to discover through electronic communications; digital or any other e-technology means of communications. Upon receiving such notice the party who is asked to discover may disclose the information required by means of electronic communications; digital or e-technology modes of communications. It shall be sufficient to accept commissioned affidavit electronically; digitally or through any other means of e-technology modes of communications.
36	'...(2) Any party requiring another party to submit to such examination shall deliver a notice specifying the nature of the examination required, the person or persons by whom, the place where and the date (being not less than fifteen days from the date of such notice) and time when it is desired that such examination shall take place, and requiring such other party to submit himself for examination then and there...' ⁹⁶	Rule 36A The notice that must be given for medical examination may be sent through electronic communications or any other e-technology modes of communications.
37	'...(1) A party who receives notice of the trial date of an action shall, if he has not yet made discovery in terms of rule 35, within 15 days deliver a sworn statement which complies with rule 35 (2)...' ⁹⁷	Rule 37A The pre-trial notice required in terms of this rule, may be sent electronically to the other party or through digital or any other e-technology means of communications. The parties to the proceedings may conduct the pre-trial process through digital or any other e-technology means of communications, namely, teleconferences or Skype to narrow down the issues and eliminate

⁹³ Rule 31(1) of the Uniform Rules of Court.

⁹⁵ Rule 35 of the Uniform Rules of Court.

⁹⁶ Rule 36 of the Uniform Rules of Court.

⁹⁷ Rule 37 of the Uniform Rules of Court.

		unnecessary or irrelevant evidence.
38	<p>‘...(2) The witnesses at the trial of any action shall be examined <i>viva voce</i>, but a court may at any time, <i>for sufficient reason, order that all or any of the evidence to be adduced at any trial be given on affidavit or that the affidavit of any witness be read at the hearing, on such terms and conditions as to it may seem meet</i>: Provided that where it appears to the court that any other party reasonably requires the attendance of a witness for cross-examination, and such witness can be produced, the evidence of such witness shall not be given on affidavit.</p> <p>(3) A court may, on application on notice in any matter where it appears convenient or necessary for the purposes of justice, make an order for taking the evidence of a witness before or during the trial before a <i>commissioner of the court, and permit any party to any such matter to use such deposition in evidence on such terms, if any, as to it seems meet, and in particular may order that such evidence shall be taken only after the close of pleadings or only after the giving of discovery or the furnishing of any particulars in the action...</i>’ 98</p>	<p>Rule 38A The court shall accept evidence that is gathered through digital or any other e-technology means of communications instead of using commissioners. Such witnesses may give direct evidence; may be cross-examined and re-examined during the trial through digital or any other e-technology means of communications.</p> <p>Rule 38B The witnesses who are subpoenaed to give evidence in civil proceedings; may be given an option to testify near a court wherein they reside through digital or any other e-technology means of communications. The witnesses who are issued with subpoena <i>duces tecum</i> shall electronically send the document required for the court proceedings to the registrar of the court before the trial. Such witnesses may be cross examined during the trial in relation to the contents of such document through digital or any other e-technology means of communications, without necessarily being physically present in court.</p>
39	<p>‘...(16) A record shall be made of-</p> <p>(a) any judgment or ruling given by the court,</p> <p>(b) any evidence given in court,</p> <p>(c) any objection made to any evidence received or tendered,</p> <p>(c)proceedings of the court generally (including any inspection <i>in loco</i> and any matter demonstrated by any witness in court); and</p> <p>(d) any other portion of the proceedings which the court may specifically order to be recorded.</p> <p>(17) Such record shall be kept by such means as to the court seems appropriate and may in particular be taken down in</p>	<p>Rule 39A The trial proceedings shall be conducted by means of digital or any other e-technology modes of communications to enable the witnesses to give evidence through digital or e-technology means and to enable the process of cross examination and re-examination during the trial proceedings. If a party wishes that the proceedings be conducted in camera, such a party must apply to the court to grant such an order, in which case the witnesses must</p>

	shorthand or be recorded by mechanical means... ⁹⁹	be physically present in the court proceedings.
45	‘...(1) The party in whose favour any judgment of the court has been pronounced may, at his own risk, sue out of the office of the registrar one or more writs for execution thereof as near as may be in accordance with Form 18 of the First Schedule: Provided that, except where immovable property has been specially declared executable by the court or, in the case of a judgment granted in terms of rule 31 (5), by the registrar, no such process shall issue against the immovable property of any person until a return shall have been made of any process which may have been issued against his movable property, and the registrar perceives therefrom that the said person has not sufficient movable property to satisfy the writ...’ ¹⁰⁰	Rule 45 The court shall grant court orders that enable the sheriffs to execute judgments and writs through electronic communications; digital or any other e-technology means of communications.
62	‘...(1) Where a matter has to be heard by more than one judge, a copy of all pleadings, important notices, annexures, affidavits and the like shall be filed for the use of each additional judge. .. (2) All documents filed with the court, other than exhibits or facsimiles thereof, shall be clearly and legibly printed or typewritten in permanent black or blue black ink on one side only of paper of good quality and of A 4 standard size. A document shall be deemed to be typewritten if it is reproduced clearly and legibly on suitable paper by a duplicating, lithographic, photographic or any other method of reproduction...’ ¹⁰¹	Rule 62A When parties resort to electronic filing of the court’s documents, the court shall not require such parties to provide or file additional hard-copies to the court. The documents shall be saved in an electronic file and shall be filed in an archive file that is collected, stored and used by the new archive department.

4.10 Magistrates’ Court Rules

Rule	Current provision	Recommendation
Def	‘...“ deliver ” (except when a summons is served on the opposite party only, and in rule 9) means to file with the clerk of the court and serve a copy on the opposite	Definitions ‘Signature required in terms of the rules’ shall include advanced electronic signature as defined by

⁹⁹ Rule 39 of the Uniform Rules of Court.

¹⁰⁰ Rule 45 of the Uniform Rules of Court.

¹⁰¹ Rule 62 of the Uniform Rules of Court.

	<p>party, and “delivery”, “delivered” and “delivering” have corresponding meanings...’¹⁰²</p>	<p>section 1 of the ECTA and the Law Society guidelines.</p> <p>‘Delivery’ shall include electronic communications; digital or e-technology means of ensuring that the court papers are properly received by all parties to the proceedings.</p> <p>‘Filing’ shall include filing through electronic communications or by using digital or e-technology means of communications.</p> <p>‘Issuing’ shall include presentation of summons or any other court documents electronically or digitally or through other proficient e-technology means of communications; to the registrar of the court and the registrar shall insert an advanced electronic signature into document to complete the filing process.</p> <p>‘Service’ shall include sending electronic e-mail or using Facebook;¹⁰³ social media or digitally or by using e-technology means of communications; without necessarily obtaining a court order to ensure that the courts’ papers are proficiently served on the other party. Thereafter, proof of such service must be provided to the court by attaching the screen dump, for example, into subsequent court’ papers.</p>
3	<p>‘...(1) The first document filed in a case or any application not relating to a then pending case shall be numbered by the clerk of the court with a consecutive number for the year during which it is filed.</p> <p>(2) Every document afterwards served or delivered in such case or application or in any subsequent case in continuation of any such application shall be marked with such number by the party delivering it and shall not be received by the clerk of the court until so marked.</p> <p>(3) All documents delivered to the clerk of the court to be filed of record and any</p>	<p>Rule 3A</p> <p>The court shall not require the clerk of the court to number the documents when the proceedings are commenced through electronic; digital or any other e-technology means of communications.</p>

¹⁰² Rule 1 of the Magistrates’ Courts’ Rules.

¹⁰³ *CMC Woodworking machinery (Pty) Ltd v Odendaal Kitchens* para 1-13.

	minutes made by the court shall be filed of record under the number of the respective action or application... ¹⁰⁴	
5	<p>‘...(1) Subject to the provisions of section 59 of the Act, the process of the court for commencing an action shall be by summons calling upon the defendant to enter an appearance to defend the action within 10 days after service to answer the claim of the plaintiff and warning the defendant of the consequences of failure to do so...</p> <p>‘...(2) The summons shall be signed by the clerk of the court and shall bear the date of issue by him...’</p>	<p>Rule 5A The process of issuing the summons by the clerk of the court may be conducted electronically or digitally or by using other means of e-technology modes of communications. The advanced electronic signature¹⁰⁵ may be inserted in the summons instead of manually signing the summons.</p> <p>Rule 5(2)A The clerk of the court may insert an advanced electronic signature in the summons as required by the rules to complete the issuing process.</p>
6(2)	<p>‘...(2) (a) The endorsement shall be <i>signed</i> by the plaintiff.</p> <p>(b) The full address where the plaintiff will accept service of process, notices or documents and also the postal address of the person signing the endorsement shall be given in the summons...¹⁰⁶</p>	<p>Rule 6(2) A The plaintiff may endorse the summons by inserting the advanced electronic signature as defined in section 1 of the ECTA and Law Society guidelines.</p> <p>Rule 6(2) (b) (B) The plaintiff may provide full particulars of the place where the defendant may serve the documents through electronic communications or by using digital or e-technology devices. It shall be sufficient to send the particulars by means of digital or e-technology means of communications.</p>
9	<p>‘...1) A party requiring service of any process, notice or other document to be made by the sheriff shall deliver to him the original of such process, notice or document, together with as many copies thereof as there are persons to be served: Provided that the clerk of the court may, at the written request of the party requiring service, hand such process, notice or document and copies thereof to the sheriff...</p>	<p>Rule 9A The sheriff may serve the courts’ papers electronically or by using digital or any other e-technology means of communications.</p> <p>Rule 9AA The subpoenas or subpoena <i>duces tecum</i> may be served and such witnesses may give direct</p>

¹⁰⁴ Rule 3 of the Magistrates’ Courts’ Rules.

¹⁰⁵ As defined in section 1 of the ECTA.

¹⁰⁶ Rule 6 of the Magistrates Courts Rules.

	<p>‘...(10) Service of a subpoena on a witness may be effected at a reasonable time before attendance is required in any manner hereinbefore prescribed but need not be effected through the sheriff...</p> <p>Rule 9 ‘...(5) Where the person to be served keeps his residence or place of business closed and thus prevents the sheriff from serving the process, it shall be sufficient service to affix a copy thereof to the outer or principal door or security gate of such residence or place of business or to place such copy in the post box at such residence or place of business...’¹⁰⁷</p>	<p>evidence; be cross-examined and re-examined during the trial proceedings through digital recordings; skype or any other e-technology modes of communications.</p> <p>Rule 9(5) A A party, who is intentionally avoiding service for whatever reasons, may be served by an e-mail; Facebook;¹⁰⁸ social media; or by using digital or e-technology means of communications.</p>
23	<p>‘...(1) After the close of pleadings, but not later than 15 days before the date of trial, either party may deliver a notice to the other party calling on him to deliver a schedule specifying the books and documents in his possession or under his control which relate to the action and which he intends to use in the action or which tend to prove or disprove either party’s case. Such schedule, verified by affidavit, shall be delivered by the party required to do so within 10 days after the delivery of the aforesaid notice. If privilege be claimed for any of the books or documents scheduled, such books or documents shall be separately listed in the Schedule and the ground on which privilege is claimed in respect of each shall be set out...’¹⁰⁹</p>	<p>Rule 23(1)(a) Where parties have means to use e-technology, digital devices or electronic communications, such parties may use these to effect discovery. The court shall consider such evidence as authentic and it shall admit the latter during the proceedings.</p>
25	<p>‘...(1) The request in writing referred to in section 54 (1) of the Act shall be made in duplicate to the clerk of the court requesting the court to call a pre-trial conference and shall indicate generally the matters which it is desired should be considered at such conference...’¹¹⁰</p>	<p>Rule 25A The court must allow parties who have access to e-technology or digital video recording or skype to proficiently conduct pre-trial proceedings by using e-technology, digital recording, skype and other means of electronic means of communications.</p>
26	<p>‘...(1) The process of the court for compelling the attendance of any person</p>	<p>Rule 26 A</p>

¹⁰⁷ Rule 9(5) of the Magistrates Courts Rules.

¹⁰⁸ *CMC Woodworking machinery (Pty) Ltd v Odendaal Kitchens* para 1-13.

¹⁰⁹ Rule 23 of the Magistrates’ Courts Rules.

¹¹⁰ Rule 25 of the Magistrates’ Courts Rules.

	<p>to give evidence or to produce any book, paper or document shall be by subpoena issued by the clerk of the court and sued out by the party desiring the attendance of such person. In the case of evidence taken on commission, such process shall be sued out by the party desiring the attendance of the witness and shall be issued by the commissioner.</p> <p>(2) There shall be handed to the sheriff (if the party suing out the subpoena desires it to be served through the sheriff) together with the said subpoena so many copies thereof as there are witnesses to be summoned and also such sum of money as the party for whom they are to be summoned considers that the sheriff shall pay or offer to the said witnesses for their conduct money...¹¹¹</p>	<p>The court where and when necessary and possible; may permit parties to gather evidence by using interrogatories, commission <i>de bene</i> through the use of e-technology or digital video recording or skype.</p>
29	<p>‘...(1) Unless the court shall otherwise order, the trial of an action shall take place at the court-house from which the summons was issued...’¹¹²</p>	<p>Rule 29(1)A</p> <p>The court must digitally video record the trial civil proceeding, unless there is a request that such proceedings be conducted in camera.</p> <p>These digital recordings or e-technology must be archived in the courts’ file and parties may request copies but this is subject to the payment of a fee determined by the clerk of the court and such a request must be made in writing to the new archived department.</p>

4.11 Small Claims Court Rules

Rule	Current provision	Recommendation
Def	<p>‘deliver’ (except in rules 8 and 13 means to file with the clerk of the court and serve a copy of the opposite party and ‘delivery’ and ‘delivering’ have a corresponding meaning...¹¹³</p>	<p>‘Signature required in terms of the rules’ shall include advanced electronic signature as defined by section 1 of the ECTA and the Law Society guidelines.</p>

¹¹¹ Rule 26 of the Magistrates’ Courts’ Rules.

¹¹² Rule 29 of the Magistrates’ Courts Rules.

¹¹³ Rule 1 of the Small Claims Courts Rules.

		<p>'Delivery' shall include electronic communications; digital or e-technology means of ensuring that the court papers are properly received by all parties to the proceedings.</p> <p>'Filing' shall include filing through electronic communications; or by using digital or e-technology means of communications.</p> <p>'Issuing' shall include presentation of summons or any other court documents electronically to the registrar of the court and the registrar shall insert an advanced electronic signature¹¹⁴ into the documents to complete the filing process.</p> <p>'Service' shall include sending electronic e-mail or using Facebook; other social media and e-technology or digital means of communications; without necessarily obtaining a court order to ensure that the courts' papers are proficiently served on the other party. Thereafter, proof of such service must be provided to the court by attaching the screen dump; for example, into subsequent court' papers.</p>
3	<p>'...(1) The summons filed in a case shall be numbered by the clerk of the court with a consecutive number for the year and recorded in a register...</p> <p>...(4) Copies of such records may be made by any person in the presence of the clerk of the court...'115</p>	<p>Rule 3(1) A</p> <p>The summons may be filed electronically or by means of digital or any other e-technology modes of communications.</p> <p>Rule 3(4) A</p> <p>A party who resorts to electronic; digital or any other e-technology means of filing shall not be obliged to make hard-copies as required in terms of this rule.</p>
9	<p>'...(1) The summons shall be served on the defendant not less than 10 days before the date of trial...</p> <p>(2) The summons shall be signed by the clerk of the court and shall bear the date of issue by him...'116</p>	<p>Rule 9(1) A</p> <p>The summons may be served by e-mail or electronic communications; digital or e-technology means of communications.</p> <p>Rule 9(2) A</p>

¹¹⁴ As defined in section 1 of the ECTA.

¹¹⁵ Rule 3 of the Small Claims Courts Rules.

¹¹⁶ Rule 9 of the Small Courts Court Rules.

		The clerk may insert the advanced electronic signature and the same shall be accepted by the courts as such.
12	'...(1) The plaintiff shall make as many copies of the summons as there are persons to be served...' ¹¹⁷	Rule 12(1) A When parties resort to electronic communications; digital and e-technology to effect serve, the sheriff shall not be obliged to make hard-copies. Such documents shall be saved in the electronic or archives' courts' file and shall be stored in the new archive department.

¹¹⁷ Rule 12 of the Small Claims Courts Rules

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